146 U.S. 351

RECORD, CASE No. 13,611.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No, 71.

JOHN MITCHELL, AS ADMINISTRATOR, &c., OF LAWRENCE MITCHELL, DECEASED, PLAINTIFF IN ERROR,

vs.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 22, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 27, 1892.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between John Mitchell, as administrator, &c., of Lawrence Mitchell, deceased, plaintiff, and The New York, Lake Erie and Western Railroad Company, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 14th day of August, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

[L. S.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
E. HENRY LACOMBE.

2 [Endorsed:] E. & O. A. 852. Supreme Court of the United States. John Mitchell, as administrator, &c., of Lawrence Mitchell, deceased, plaintiff in error, *vs.* The New York, Lake Erie and Western Railroad Company, defendant in error. Writ of error. Hermon H. Shook, attorney for plaintiff in error. Service of a copy of the within writ of error is hereby admitted this 14 day of August, 188–. Buchanan & Steele, attorney- for defendant in error. 1.45 p'd. U. S. circuit court. Filed Aug. 14, 1889. John A. Shields, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second cir-

cuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to sixty-three, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the cause of John Mitchell, as administrator, &c., of Lawrence Mitchell, deceased, plaintiff in error, against The New York, Lake Erie and Western Railroad Company, defendant in error, as the same remain of record and on file in said office.

Seal U. S. Circuit Court, South. Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 19th day of August, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

JOHN A. SHIELDS, *Clerk.*

3 United States Circuit Court, Southern District of New York.

JOHN MITCHELL, as Administrator, &c., of the Estate of Lawrence Mitchell, Deceased, Plaintiff,
against
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant.

The plaintiff, by his attorney, Hermon H. Shook, complaining, alleges:

I. That the plaintiff is a subject of the Kingdom of Great Britain and resides in the city of New York.

II. On information and belief that at the times herein stated the defendant was and still is a corporation duly organized, incorporated, and existing under and by virtue of the laws of the State of New York, having its principal place of business in the city of New York, in said State, and was the owner of a certain railroad known as the New York, Lake Erie and Western railroad, together with the track, cars, locomotives, and other appurtenances thereto belonging, and were running and operating said railroad.

III. That on the 15th day of November, 1887, one Lawrence Mitchell, an infant of the age of sixteen years, was on a coal
4 train of the defendant by the license of defendant while said train was being drawn by a locomotive on defendant's track, as plaintiff is informed and believes; that, as plaintiff is informed and believes, while said train so drawn was running into Hoboken, in the State of New Jersey, the defendant so negligently and unskillfully conducted itself in the management of said train that through the negligence of the defendant and its servants in guiding said train the said Lawrence Mitchell was thrown from said train by a sudden and violent jerk or jar thereof without any fault or carelessness on his part, and that after being so thrown from said train the said train passed over the body of said Lawrence Mitchell, severing his left leg therefrom, and was thereby so injured as to cause his death.

IV. That the said Lawrence Mitchell left no widow, and that his only next of kin is John Mitchell, his father and the plaintiff herein, who has suffered pecuniary injury by the death of said Lawrence Mitchell and has been otherwise injured thereby to his damage five thousand dollars.

V. That the said Lawrence Mitchell, so killed as aforesaid, died intestate, and that on the second day of April, 1888, letters of administration, with limited power to prosecute, dated on that day, were duly issued and granted to the plaintiff by the surrogate of the county of New York, in the State of New York, whereby the
5 plaintiff was duly appointed administrator as aforesaid, and that thereafter and thereupon he duly qualified and entered upon the duties of his said office.

VI. Wherefore the plaintiff demands judgment against the defendant for the sum of five thousand dollars besides the costs of this action.

HERMON H. SHOOK,
Plaintiff's Attorney.

Office and post-office address, 132 Nassau street, New York.

CITY AND COUNTY OF NEW YORK, } ss:
Southern District of New York, }

John Mitchell, being duly sworn, says that he is the plaintiff herein, and that he has read the foregoing complaint, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JOHN MITCHELL.

Sworn to before me this 17th day of May, 1888.
ALBERT C. PHILLIPS,
Com. of Deeds, N. Y. Co.

(Endorsed:) United States circuit court, so. dist. of New York. John Mitchell, as administrator, &c., of Lawrence Mitchell,
6 *vs.* The New York, Lake Erie and Western Railroad Company. Complaint. Herman H. Shook, plaintiff's attorney; office & P. O. address, 132 Nassau street, New York. U. S. circuit court. Filed May 22, 1888. John A. Shields, clerk.

7 U. S. Circuit Court.

JOHN MITCHELL, Adm'r, &c., of —— ——,
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD CO.

You will please take notice that we have been retained by and appear for the defendant in the above-entitled action, and demand

that all papers be served on us at our office, No. 21 Cortlandt street, New York.

Dated New York, May 28th, 1888.

Yours, &c., BUCHANAN & STEELE,
Att'ys for Def't, 21 Cortlandt St.

To H. H. Shook, Esq., att'y for pl'ff, 132 Nassau St., N. Y.

(Endorsed:) U. S. circuit court. John Mitchell, adm'r, &c., *vs.* The N. Y., L. E. & W. R. R. Co. Notice of appearance. Buchanan & Steele, att'ys for def't, 21 Cortlandt St., N. Y. U. S. circuit court. Filed May 28, 1888. John A. Shields, clerk.

8 United States Circuit Court, Southern District of New York.

JOHN MITCHELL, as Administrator, &c., of the Estate of Lawrence Mitchell, Deceased, Plaintiff,
against
THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, Defendant.

The answer of the defendant to the complaint of the plaintiff in the above-entitled action respectfully shows—

First.

I.

The defendant denies that it has any knowledge or information sufficient to form a belief of the allegations contained in the first paragraph of the complaint.

II.

The defendant admits the allegations contained in the second paragraph of the complaint.

III.

The defendant denies the allegations contained in the third paragraph of the complaint.

IV.

The defendant denies that it has any knowledge or information sufficient to form a belief of the allegations contained in the fourth paragraph of the complaint.

9 V.

The defendant denies that it has any knowledge or information sufficient to form a belief of the allegations contained in the fifth paragraph of the complaint, and, on the contrary thereof, the defendant on its information and belief alleges that if letters of administration were issued and granted to the plaintiff by the sur-

rogate of the county of New York, as alleged in said fifth paragraph, the same were not duly or properly issued, for the reason that the said surrogate was without jurisdiction to issue the same.

Second.

For a second, separate, and distinct answer and defense to the alleged cause of action set forth in this complaint, the defendant repeats the allegations, admissions, and denials in the preceding first defense contained and alleges:

I.

That by section 1 of chapter 285 of the Public Laws of New Jersey, approved March 30th, 1869, entitled "An act to prevent accidents on railroads," it is provided as follows: "Be it enacted by the senate and General Assembly of the State of New Jersey that if any person shall be injured by a locomotive engine, car, or cars whilst walking, standing, or playing on any railroad in this State, or by jumping on or off a car whilst in motion, such person shall be deemed to have contributed to the injury sustained, and shall not recover any damages therefor from the company owning or operating the said railroad; provided, however, that this section shall not apply to any person or persons crossing a railroad at any lawful public or private crossing."

II.

That at the time of the occurrence of the alleged injuries to the plaintiff's alleged intestate mentioned in the complaint the said law was and still is in full force and effect.

III.

That at the time of the occurrence of the alleged injuries to the said Lawrence Mitchell, stated in the complaint to be the plaintiff's intestate, the said Lawrence Mitchell was riding upon a coal train of this defendant without this defendant's license or permission and in violation of its printed rules and regulations, and that the alleged injuries, if any, to said Mitchell were caused by his jumping off the defendant's said train whilst the same was in motion.

Wherefore the defendant demands judgment that the complaint be dismissed with costs.

BUCHANAN & STEELE,
Defendant's Attorneys, 21 *Cortlandt St., N. Y.*

STATE OF NEW YORK, }
City and County of New York, } ss:

Augustus R. Macdonough, being duly sworn, says that he is the secretary of The New York, Lake Erie and Western Railroad Company, the defendant named in the foregoing answer; that he has read the said answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein

stated to be alleged on information and belief, and that as to those matters he believes it to be true.

AUG. R. MACDONOUGH.

Sworn to before me this 25th day of June, 1888.

[L. S.] GEO. E. GRANT,
Notary Public, N. Y. City & Co.

(Endorsed:) United States circuit court, S. D. of N. Y. John Mitchell, as adm'r, &c., of the estate of Lawrence Mitchell, dec'd, plaintiff, against The New York, Lake Erie & Western Railroad Company, defendants. Answer. Buchanan & Steele, defendant's attorneys, 21 Cortlandt St., N. Y. U. S. circuit court. Filed Jun. 27, 1888. John A. Shields, clerk.

12 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the 8th day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: The Honorable William J. Wallace, circuit judge.

JOHN MITCHELL, Adm'r, &c.,
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

Now comes the plaintiff, by Herman H. Shook, Esq., his attorney, and moves the trial of this cause.

Likewise comes the defendant, by Chas. Steele, Esq., *his* attorney.

Thereupon a jury is empannelled and the cause proceeds to trial.

After hearing the evidence of the plaintiff, the argument of counsel for the respective parties, the jury, by direction of the court, say that they find a verdict for the defendant.

On motion of Mr. Shook, it is ordered that the plaintiff have a stay of all proceedings on said verdict for sixty days from May 8, 1889, within which to prepare and serve a case, with leave to turn
13 the same into a bill of exceptions.

JOHN A. SHIELDS, *Clerk.*

14 Circuit Court of United States, Southern District of New York.

JOHN MITCHELL, as Administrator, &c., of Lawrence Mitchell, Deceased, Plaintiff,
against
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant.

This cause having come on to be heard before Hon. William J. Wallace and a jury on May 8th, 1889, and the jury having found a verdict for the defendant and against the plaintiff, and the defendant's costs having been duly taxed at the sum of $71.42:

Now, on motion of Buchanan & Steele, attorneys for the defendant, it is—

Ordered, adjudged, and decreed that the said defendant, The New York, Lake Erie & Western Railroad Company, do have and recover from the plaintiff, John Mitchell, as administrator, &c., the said sum of $71.42, costs and disbursements, and that said defendant have execution therefor.

Judgment signed this 7th day of August, 1889.

JOHN A. SHIELDS, *Clerk.*

15 (Endorsed:) Circuit court of the United States for the southern district of New York. John Mitchell, as adm'r, &c., *vs.* The New York, Lake Erie and Western Railroad Company. Judgment-roll. U. S. circuit court. Filed Aug. 1, 1889, 11.30 a. m. John A. Shields, clerk.

16 United States Circuit Court, Southern District of New York.

JOHN MITCHELL, as Administrator, &c., of the Estate of Lawrence Mitchell, Deceased,
against
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

Afterwards, to wit, at a circuit court of the United States held at the court-rooms, in the United States post-office building, in the city of New York, in and for the southern district of New York, before Honorable William J. Wallace, circuit judge of the second circuit and appointed to hold the circuit court for the southern district of New York, on the 8th day of May, 1889, the aforesaid issues so joined between the parties as aforesaid came on to be tried by a jury for that purpose duly empaneled, at which day came there as well the said plaintiff as the said defendant, by their respective attorneys, and the jurrors of the jury aforesaid for that purpose duly empaneled to try the said issues, being called, also came, and were then and there in due manner chosen and sworn to try the said issues.

17 Then and there by order of the court, on consent of the parties, the complaint of the plaintiff was so amended as to lay the damages at five thousand one hundred dollars in *in* said complaint and the prayer thereof.

And upon the trial of said issues the counsel for the plaintiff, to maintain and prove the issues on his part, called ROBERT SCHUBERT, who testified as follows:

My name is Robert Schubert. I live at 304 New York avenue, Jersey City Heights. On the 15th of November, 1887, I lived at No. 7 Madison street, Hoboken, New Jersey. I know John Mitchell, the plaintiff in this action. I knew Lawrence Mitchell, his son, in his lifetime. I remember being with him on the 15th of November, 1887. It was six o'clock in the evening that I met him. He called at my home in Hoboken and we went to Secaucus swamps, and stayed ther- around an hour and then came back to Bergen, on

the other side of the tunnel. When we got there we were pretty tired, and Larry said, "There is a coal train; there is no use walking up that hill if we can ride home." I said, "All right." We agreed, and we went down and sat on the train there twenty or twenty-five minutes and finally we got tired, and this fellow that was with us passed the remark, "I am getting tired; we better walk home; this train don't go through." I said, "I will ask the next brakeman passing." A brakeman passed and Henry says, "Don't ask him; he may throw us off." I said, "We will run our chances; we might as well be thrown off the train as to sit here all night." Finally the brakeman passed, and I said, "Will you please tell me what
18 time this train is going?" He said, "I don't know; I guess it is going pretty soon now." It did go about fifteen minutes afterwards. Everything was all right, and we came near to the place where we wanted to get off. We came through the tunnel. There were others on the train, but they were not with us at that time. I observed five or six others on the train. I cannot say how many others besides. We were on separate cars, so that in case of danger we could easily get off. It was a long train, about sixty or seventy cars. Lawrence was right on the car in front of me. There was a gentleman on the train by the name of Robbie Henry I knew. As we came near First street this car gave this jerk and threw me back, and as I fell back I saw Lawrence fall. When I got up I missed him. When I saw him fall I knew it must have thrown him off. I went as soon as I could and picked him up, took off my coat and put it around his leg, and carried him away. After the jerk I saw Lawrence go down. I guess he went through the bumpers. I got off some thirty or forty feet away, and found him about thirty feet back. I saw him lying there right alongside the track with one leg off. I pulled him away. I carried him over to the depot, and his brother—he came running up, of course, to see what was up, and I told him, and me and him went up to the first drug store we could find and telephoned to the police station and they sent for an ambulance. The last time I saw him after that was five minutes after he died at the hospital, which was on a Thursday, a couple of days after the occurrence. I have ridden on those trains before, and have seen others than the brakeman and conductors riding on them. I have seen hundreds.

19 Cross-examined:

The first I met Lawrence Mitchell that day was when he and his brother came to my home, in Madison street.

Redirect:

We intended to get off that train at First street. The sudden jerk or jarring took place at Ferry street, a block from First street. We were to get off at First street, as it would take us to the ferry to come to New York. Lawrence lived in 30th street, New York city.

Recross:

(Balance of p. 4, p. 5, and p. 6 to the 12th interrogatory stricken out.)

20 Q. How often have you ridden on these coal trains?

A. I don't know; I hadn't been in Hoboken so much.

Q. Did anybody ever give you permission to ride there?

A. They never said anything. I have ridden with these freightmen and talked with them lots of times. They never put me off when I rode. I never threatened to stone the men if they put me off.

By the COURT:

Q. You said on your direct examination that some remark was made about the brakeman driving you off after you had waited awhile on this train.

A. I said that Henry said, "Won't they put us off if we ask them what time the train will go through?"

Q. You rather expected they might?

A. That is what we expected; we run the chances. We might as well get thrown off as to sit there all night.

Re-recross:

I think it was about half past nine when we came back. It was after dark. We were going to get off at First street. I have
21 jumped off and on those trains once in awhile.

Q. Was anybody riding alongside you at that time?

A. No; we each had our own car. Lawrence Mitchell was in front of me; Henry was in the back. I saw Mitchell fall over. I fell back, and he fell, too. I fell back into the car. Lawrence was sitting on the end of the car—on the top of the car. The car was full of coal, and his feet hanging over down between the cars. I don't know what kind of a jerk it was. I guess it was slackening or swiftening the speed. I have ridden on those coal trains before.

Q. Did you ever ride on one that did not jerk some?

A. I don't know; I might have. After this accident I moved over to 30th street—the same house where the Mitchells lived—and we lived there together for some time. I have mentioned about my testimony to the lawyer four times only this last week here. I have not talked much with Mr. Mitchell.

By the COURT:

Q. You don't mean to say that you ever got permission from anybody to ride on these cars?

A. No; we never got permission.

Q. You knew that the brakeman winked at it sometime-?

A. They saw it.

Q. Did they not put you off?

A. I never got put off.

Q. Did they sometimes put people off who were riding on those coal trains?

A. I don't know; I know they never put me off.

22 Q. Then why did you make the remark that you did make to Mitchell—that perhaps the brakeman would throw you off?

Mr. STEELE: That is the remark that Mitchell made to him.

—. Mitchell was scared. I said, "We will run the chances, anyhow."

By a JUROR:

Q. Did you ever see or know of anybody having been put off the train?

A. No; I have seen little fellows try to jump on, and they might throw coal at them or something like that to keep them away.

By the COURT:

Q. These cars are all loaded with coal, I suppose?

A. Yes, sir.

Q. And the trains would stop temporarily, I suppose?

A. It was stopped during the night.

Q. What was the train doing when you got off?

A. I suppose waiting to go through the tunnel.

Q. They stop just before they enter the tunnel for some signal, I suppose?

A. Yes, sir.

Re-recross:

When we got on the brakemen were passing with their lanterns right along. I don't know whether they were connected with that special train or in the employ of the company, but they were brakemen, I know, because they had lanterns and were walking up and down.

23 The plaintiff, further to maintain the issues on his part, called ROBERT HENRY, who testified as follows:

My name is Robert Henry. I am working at Mansfield & Fagan's. I live at 164 Clinton street, Hoboken. I was on the train Schubert has been talking about here on the stand. I remember the occasion. I got on at the west end. I was not with his party. I got on at the west end, back of the tunnel. I saw others on the train. It was a coal train, and coal in the cars. I saw brakemen and conductors there. I was not ordered off. I remained on the train while it went through the tunnel. I was going to get off between Ferry and First street-. When I got off the train I saw Schubert running up towards Ferry street and I stopped awhile, and I saw Schubert take off his coat and pick up something, and I ran up and saw it was Mitchell, and then we carried him to the station. I got off to go home right near the station, between First and Ferry. Before I got off my attention was attracted by a kind of jerk on the train, which stirred me up a little and shook me up.

Q. How were you prevented from being thrown off?

A. There was a kind of hollow in one corner of the car and I was

sitting down in there, right on the coal, on the front part of the car. It is about a mile and a half from the other side of the tunnel to First street.

Cross-examined:

I say I was not with Mitchell and Schubert. I went out to Secaucus, trying to get some hickory nuts on the trees. I went out there about three o'clock in the afternoon. I had not seen
24 the Mitchell boys that day before. I was slightly acquainted with them. I had seen them with Schubert before. I did not belong to the gang that used to kick coal off. I have always worked. I did not know there was such a crowd there; never knew anything about that. I was at the West Shore station before I went out to Secaucus. I was going to get off between First and Ferry streets. I was going to jump off.

Q. That is the way the boys always got off?

A. I suppose so; or else fall off. I was behind Schubert. Nobody was near. I was by myself. Nobody asked me to get on the train. The brakeman passed me and saw me on the train. I don't know whether it is a railroad yard there or not. There is a lot of cars there. The jerk was as if the engine pulled ahead. I was riding on the front of the car and it threw me back into the coal. I never saw boys put off those trains. I don't know how often I have ridden on those trains. I never paid any fare. My occupation at Mansfield & Fegan's was helping the blacksmith. Schubert worked there at one time. He helped finishing. I was not working there at the time of the accident. I took a day off. I had no trouble in getting off.

The plaintiff, further to maintain the issues on his part, called JOHN MITCHELL, who testified as follows:

My name is John Mitchell, and I am the plaintiff in this action and the father of Lawrence Mitchell, deceased. I am the person described in these letters of administration.

25 Plaintiff's counsel offers in evidence exemplified copy of letters of administration, which were marked Plaintiff's Exhibit No. 1, and are as follows:

The people of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

Know ye that we, having examined the records and files in the office of the surrogate of the county of New York, do find there remaining a certain record of the letters of administration (with limited power expressed in the margin thereof) granted to John Mitchell upon the goods, chattels, and credits of Lawrence Mitchell, deceased, in the words and figures following, to wit:

The people of the State of New York to John Mitchell, of the city of New York, father of Lawrence Mitchell, deceased, send greeting:

Whereas said Lawrence Mitchell departed this life intestate on the 17th day of November, 1887, being at or immediately previous to his death an inhabitant of the county of New York, by means whereof the ordering and granting administration of all and singular the goods, chattels, and credits whereof the said intestate died possessed in the State of New York, and also the auditing, allowing, and final discharging the account thereof doth appertain unto us, *and* we, being desirous that the goods, chattels, and the credits of the said intestate may be well and faithfully administered, ap-
26 plied, and disposed of, do grant unto you, the said John Mitchell, with the limited power expressed in the margin hereof, by these presents to administer and faithfully dispose of all and singular the said goods, chattels, and the credits, ask, demand, recover, and receive the debts which unto the said intestate whilst living and at the time of his death did belong, and to pay the debts which the said intestate did owe as far as such goods, chattels, and credits will thereunto extend and the law require, hereby requiring you to make or cause to be made a true and perfect inventory of all and singular the goods, chattels, and credits of the said intestate within a reasonable time and return a duplicate thereof to our surrogate of the county of New York within three months from the date of these presents, and if further personal property or assets of any kind not mentioned in any inventory that shall have been so made shall come to our possession or knowledge to make or cause to be made in like manner a true and perfect inventory thereof and return the same within two months after the discovery thereof, and also to render a just and true account of administration when thereunto required, and we do by these presents depute, constitute, and appoint you, the said John Mitchell, administrator of all and singular the goods, chattels, and credits of the said Lawrence Mitchell, deceased.

The limited power expressed in the margin is as follows:

"These letters are issued with power to prosecute only and not with power to collect or compromise."

27 In testimony whereof we have caused the seal of
[L. S.] office of the surrogate's court of the county of New York to be hereunto affixed.

Witness Hon. Rastus S. Ransom, surrogate of said county, at the city of New York, the second day of April, in the year of our Lord one thousand eight hundred and eighty-eight.

JAMES F. McLAUGHLIN,
Clerk of the Surrogate's Court.

All which we have caused by these presents to be exemplified and the seal of our said surrogate's court to be hereunto affixed.

Witness Rastus S. Ransom, surrogate, at the city of New
[L. S.] York, the eighth day of March, in the year of our Lord one

thousand eight hundred and eighty-nine, of our Independence the one hundred and thirteenth.

JAMES F. McLAUGHLIN,
Clerk of the Surrogate's Court.

I, Rastus S. Ransom, surrogate of said county and sole
[L. S.] presiding magistrate of the surrogate's court, do hereby certify that James F. McLaughlin, whose name is subscribed to the preceding exemplification, is the clerk of the said surrogate's court of the county of New York, and that full faith and credit are due to his official acts. I further certify that the seal affixed
28 to the exemplification is the seal of our said surrogate's court, and that the attestation thereof is in due form and according to the form of attestation used in this State.

Dated New York, March 8th, 1889.

RASTUS S. RANSOM, *Surrogate.*

STATE OF NEW YORK, }
City and County of New York, } *ss.:*

I, James F. McLaughlin, clerk of the surrogate's court of the county of New York, do hereby certify that Rastus S. Ransom, whose name is subscribed to the preceding certificate, is the sole presiding magistrate of the surrogate's court of the county of New York, duly elected, sworn, and qualified, and that the signature of said magistrate to said certificate is genuine.

In testimony whereof I have hereunto set my hand and
[L. S.] affixed the seal of the said court this 8th day of March, 1889.

JAMES F. McLAUGHLIN,
Clerk of the Surrogate's Court.

(Endorsed:) Exemplified copy letters of administration (with limited power only) granted to John Mitchell upon the goods, chattels, and credits of Lawrence Mitchell, deceased. Pl'ff's Ex. No. 1, May 8th, 1889, F. M. A.

29 Counsel for plaintiff offers in evidence exemplified copy of the act of the New Jersey legislature of March 3rd, 1848, which was marked Plaintiff's Exhibit No. 2, and is as follows:

STATE OF NEW JERSEY.

(Coat of arms.)

An act to provide for the recovery of damages in cases where the death of the person is caused by wrongful act, neglect, or default.

(Revision.) Approved March 3, 1848.

1. Whenever the death of a person shall be caused by wrongful act, neglect, or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to

maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

2. Every such action shall be brought by and in the names of the personal representative of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and the next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the
30 jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to the wife and next (of) kin of such deceased person; provided, that every such action shall be commenced within twelve calendar months after the death of such deceased person.

3. On request by the defendant, or the defendant's attorney, the plaintiff on the record shall be required to deliver to the defendant or to the defendant's attorney a particular account in writing of the nature of the claim in respect to which damages shall be sought to be recovered.

STATE OF NEW JERSEY.

(Coat of arms.)

DEPARTMENT OF STATE.

I, Henry C. Kelsey, secretary of state of the State of New Jersey, do hereby certify that the foregoing is a true copy of an act passed by the legislature of this State and approved by the governor the third day of March, A. D. 1848, as taken from and compared with the original now on file in my office.

In testimony whereof I have hereunto set my hand and affixed my official seal, at Trenton, this twelfth day of March, one
[L. S.] thousand eight hundred and eighty-nine.

HENRY C. KELSEY,
Secretary of State.

31 STATE OF NEW JERSEY.

(Coat of arms.)

I, Robert S. Green, governor of the State of New Jersey, do hereby certify that Henry C. Kelsey, Esquire, who hath signed the annexed certificate and whose official seal is thereto annexed, was at the doing thereof and now is secretary of state of the State of New Jersey, duly appointed, commissioned, and sworn, and that full faith and credit are to be given to his official attestations; that the said signature is in the proper handwriting of the said Henry C. Kelsey

and the seal his seal of office, and that the said certificate is in due form of law and by the proper officer.

In testimony whereof I have hereunto set my hand and caused the great seal of the State of New Jersey to be hereunto affixed, at the city of Trenton, in said State, this twelfth day [L. S.] of March, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and thirteenth.

ROBERT S. GREEN.

By the governor:

HENRY C. KELSEY,
Secretary of State.

(Endorsed:) Exemplified copy — an act to provide for the recovery of damages in cases where the death of a person is caused by the wrongful act, neglect, or default. Revised Statutes of New Jersey, 1877, page 294. Pl'ff's Ex. No. 2, May 8th, 1889, F. M. A.

32 Counsel for plaintiff offers in evidence exemplified copy of the records of the board of health of Hudson county, N. J., which was marked Plaintiff's Exhibit No. 3, and is as follows:

UNITED STATES OF AMERICA,
State of New Jersey, County of Hudson, } ss:

I, Dennis McLaughlin, clerk of the county of Hudson, State of New Jersey, and also clerk of the court of common pleas holden therein, do hereby certify that Honorable Job H. Lippincott, whose name is subscribed to the annexed certificate, is the presiding judge of the court of common pleas holden in and for the county of Hudson, State of New Jersey, duly commissioned and qualified, and that the signature of said judge to said certificate is genuine.

In witness whereof I have hereunto set my hand and [L. S.] affixed the seal of said court and county this 20th day of February, A. D. 1889.

DENNIS McLAUGHLIN,
Cl'k C't of Com. Pleas, Hudson Co., N. J.

UNITED STATES OF AMERICA,
State of New Jersey, County of Hudson, } ss:

I, Job H. Lippincott, presiding judge of the court of common pleas of the county of Hudson, State of New Jersey, do hereby cer-
33 tify that C. J. Rooney, Jr., was on the day of the date of the annexed transcript from the record of deaths in the county of Hudson, State of New Jersey, clerk of the board of health and vital statistics of the county of Hudson, State of New Jersey; that such clerk of the board of health and vital statistics is the proper officer to make such transcript and the attestation thereto, and that the same are in due form; that the seal affixed to said transcript is the seal of the board of health and vital statistics of the county of Hudson, State of New Jersey; that the signature thereto of the said

clerk is his own proper handwriting and is genuine, and that the said clerk is the custodian of the record so certified and attested.

Witness my hand, at Jersey City, this 20th day of February, A. D. 1889.

JOB H. LIPPINCOTT,
Presiding Judge.

34 Board of health and vital statistics of the county of Hudson, N. J., office adjoining court-house.

JERSEY CITY, *January* 30, 1889.

A Transcript from the Record of Deaths in the County of Hudson.

Vol. 3, page 188, No. 8218 of transit burials.

Date of death, November 17, 1887; full name of deceased, Lawrence Mitchell; age, 16 y., — m., — d.; married or unmarried, single; color, white; occupation, none stated; birth-place, New York; how long a resident of Hudson Co., —; father's name, John; father's birth-place, Ireland; mother's name, Ellen; mother's birth-place, Ireland; place of death, St. Mary's hospital, Hoboken; cause of death, R. R. injuries; time of attack, till death; place of burial, Cavalry cem.; undertaker, John T. Devitt; medical attendant, —; certified by C. B. Converse, Co. phys.

A true copy.

[L. S.] C. J. ROONEY, JR., *Clerk.*

(Endorsed:) Board of health and vital statistics of the county of Hudson, office adjoining court-house. Transcript of the record of the death of —— ——. N. B.—If for any reason this transcript is unsatisfactory, have it compared with original on file either in this office or in state-house, Trenton, N. J.

(Endorsed:) Pl'ff's Ex. No. 3, May 8, 1889, F. M. A.

The witness, JOHN MITCHELL, continuing, testified as follows:

35 The age of Lawrence at the time of his death was about sixteen years and five months. I saw him at the hospital. I work in the Fifth Avenue hotel as a waiter in the dining-room. I have been there twenty-six years. I went over to the hospital, and when he heard me crying over him—he was between life and death—and all he could say was, he rallied himself as well as he could and he said, "Good papa." That is all the little boy said. He never spoke another word. He died on the morning of the 17th, about nine o'clock. All he did since he left school was sometimes he would go on the telegraph and he used to get $4.50 a week, but he would make a great deal of money. He was a nice-looking boy, and a good many gentlemen used to give him presents and all that sort of thing. He used to make extra money. $4.50 would be about his average earnings; that is what he got from the company. The undertaker's bill was $63.60, and I have $50.00 of it paid. He was not married. I am the father of the deceased.

By the COURT:

He had the public school education. He was a smart boy.

Cross-examined:

I am not an American citizen. I am an Irishman. My boys were like all other boys. There was nothing wild about them. They liked fun the same as I did when I was growing up like that. They were friendly, good-hearted, and I don't know that anybody can say anything against them. Lawrence did not work steadily all the time. Sometimes he would take a notion to work for
36 a month or six weeks, and then he would like to have recreation with the boys, and all that kind of thing, the same as all boys do. He was not working at the time of this accident. My boys used to go over to Jersey City because this Schubert family used to live with them when they were small, down in Eleventh street, twelve or thirteen years ago, and when they moved over to Jersey City the Schubert and my boys went over there to visit them; of course they got acquainted with more of the boys, and consequently they used to go over once in a while there.

By the COURT:

Q. I suppose your boy supported himself? You let him do about what he chose in getting employment and let him have his own wages?

A. I was very strict, Judge, in keeping him to work, but still I didn't like sometimes to interfere with him for that he might stay out nights late; but, as you say, take it all through he did earn as much as supported himself.

Recross:

He lived with me. I left the wages between himself and his mother to fix between them. He often met me on the street and asked me if I wanted some money. I thought I might as well take it as to have him spend it, and he would offer to give me a dollar and I would take it, but what he made I left to him and his mother to settle.

Q. You took care of him at your house, so that he did not have to pay for his own living?

A. I should say I did take care of him. I think I can prove that.

Plaintiff here rested his case.
37 Defendant also here rested its case.

The COURT: I think it cannot be maintained on the evidence in this case that the railroad company was under a carrier's obligation towards the deceased as a passenger. It only owed him the duty of exercising ordinary care, which every person must exercise, not to inflict unnecessary injury upon another. In this case there is no evidence of negligence whatever. If the deceased had been a passenger, towards whom the obligation of a carrier is almost that of an insurer—that is, the obligation to take the utmost care of which

human skill and intelligence is capable—you might say that from the circumstances of the injury there was a presumption of negligence. Here there was a sudden jerk of the train, which we all know is a very common occurrence with trains of this kind, and the deceased fell off. He had put himself where he was exposed to just that hazard. I don't think there is any case of negligence on the part of the defendant, and I think in the case of a young man of sixteen or seventeen years old—a bright, intelligent young fellow like the deceased—you cannot apply to the facts here any different rule of obligation or of contributory negligence than would be applied towards an adult. You cannot term him an infant of tender years, and I see no possible theory upon which you can recover.

The DEFENDANT'S COUNSEL: We ask your honor to instruct the jury on the evidence in the case that there is no evidence of
38 negligence on the part of the defendant which caused the death of the deceased, and also that the evidence shows affirmatively that the deceased was guilty of contributory negligence. We ask upon these grounds that your honor direct a verdict for the defendant.

The COURT: I will direct a verdict for the defendant on the ground that there is not sufficient evidence to justify a recovery upon the case as it stands. There is not sufficient evidence of negligence on the part of the defendant, and the evidence proves concurring negligence on the part of the deceased.

To this direction of the court the said counsel for the plaintiff did then and there, on behalf of said plaintiff, except.

39 Whereupon the counsel for the plaintiff prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

First. It is immaterial for the jury to consider whether the plaintiff's intestate was or was not a trespasser at the time he sustained his injuries.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the counsel for said plaintiff did then and there, on behalf of the said plaintiff, except.

And the said counsel for the plaintiff further prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Second. If the jury find that the defendant, by its servants, allowed the plaintiff's intestate to go and remain upon the train, the defendant was bound to exercise proper care not to injure him while he was there.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the counsel for said plaintiff did then and there, on behalf of the said plaintiff, except.

And the said counsel for the plaintiff further prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Third. While the defendant had a right to expel the plain-
40 tiff's intestate from the train, if the jury find that the de-
fendant did not do so, but allowed him to remain, then it owed him the same duty as if he had been a passenger on a regular passenger train.

But the said judge refused to charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the counsel for said plaintiff did then and there, on behalf of the said plaintiff, e-cept.

And the said counsel for the plaintiff further prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Fourth. The fact that the plaintiff's intestate was being carried gratuitously did not relieve the defendant of the duty of exercising proper care to carry him without injury.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the counsel for said plaintiff did then and there, on behalf of the said plaintiff, except.

And the said counsel for the plaintiff further prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Fifth. The defendant is not relieved by the fact that its employés allowed the plaintiff's intestate to ride on this train contrary to express orders.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the counsel for said plaintiff did then and there, on behalf of the said plaintiff, except.

41 And the said counsel for the plaintiff further prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Sixth. If the jury find that the servants of the defendant allowed the plaintiff's intestate to ride on this freight train their permission was its permission.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the counsel for the said plaintiff did then and there, on behalf of the said plaintiff, except.

And the said counsel for the plaintiff further prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Seventh. If the jury find that by the negligence of the servants of the defendant the plaintiff's intestate was injured and died from the effects thereof, the defendant is liable in this action in the absence of contributory negligence on his part.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the counsel for the said plaintiff did then and there, on behalf of the said plaintiff, except.

And the said counsel for the plaintiff further prayed and re-

quested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Eighth. The burden is on the defendant to prove contributory negligence on the part of the plaintiff's intestate, and de-
42 fendant must establish contributory negligence by a preponderance of evidence.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the counsel for the said plaintiff did then and there, on behalf of the said plaintiff, except.

And the said counsel for the plaintiff further prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Ninth. It was not contributory negligence on the part of the plaintiff's intestate, as matter of law, to ride on this freight train if permitted to do so by the servants of the defendant.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the counsel for the said plaintiff did then and there, on behalf of the said plaintiff, except.

And the said counsel for the plaintiff further prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Tenth. The failure of the servants of the defendant to expel the plaintiff's intestate from the train was equivalent to a permission that he might ride thereon.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the counsel for the said plaintiff did then and there, on behalf of the said plaintiff, except.

And the said counsel for the plaintiff further prayed and
43 requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Eleventh. If the jury find that the plaintiff's intestate while riding on the train was exercising all the care and caution which a person of his years and capacity would exercise under the circumstances, then he was not guilty of negligence.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the counsel for said plaintiff did then and there, on behalf of the said plaintiff, except.

And the said counsel for the plaintiff further prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Twelfth. The law does not exact the same degree of care from a minor as from an adult. The caution required from the plaintiff's intestate was according to his maturity and capacity, which is to be determined by the circumstances of this case.

But the said judge refused to so charge and instruct the jury as aforesaid as requested aforesaid, and to such refusal the counsel for

said plaintiff did then and there, on behalf of the said plaintiff, except.

And the said counsel for the plaintiff further prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Thirteenth. Even if the jury should think it contributory
44 negligence on the part of plaintiff's intestate to ride on this train, if the servants of defendant who were operating the train could, by the exercise of proper care, have avoided injuring him, the defendant is liable.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the counsel for said plaintiff did then and there, on behalf of said plaintiff, except.

And the said counsel for the plaintiff further prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Fourteenth. The jury may award such damages as in their good sense and sound judgment the next of kin of the deceased should have.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the counsel for said plaintiffs did then and there, on behalf of said plaintiff, except.

And the said counsel for the plaintiff further prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Fifteenth. It is not necessary that actual pecuniary loss to the next of kin should be shown.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the counsel for said plaintiff did then and there, on behalf of said plaintiff, except.

And the said counsel for the plaintiff further prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

45 Sixteenth. There is no fixed measure of damages and no artificial rule by which they can be computed.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the counsel for said plaintiff did then and there, on behalf of said plaintiff, except.

And the said counsel for the plaintiff further prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Seventeenth. The jury may give such damages as they deem fair and just under the circumstances of the case.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the counsel for the said plaintiff did then and there, on behalf of said plaintiff, except.

And the said counsel for the plaintiff further prayed and requested to go to the jury on all the questions in the case—the question of defendant's negligence and the question of the negligence of plaintiff's intestate.

But the said judge refused to allow the jury to consider the questions as requested as aforesaid, and to such refusal the counsel for the said plaintiff did then and there, on behalf of said plaintiff, except.

And the said judge did then and there instruct and direct the jury aforesaid to find a verdict for the defendant.

46 And to such instruction and direction the counsel for the said plaintiff did then and there, on behalf of said plaintiff, except.

And the said jury aforesaid, not being allowed by the said judge to consider the questions of fact in the case, did then and there, by direction of said judge, render a verdict for the defendant.

And the said counsel for the said plaintiff did then and there move for a new trial upon the minutes of said judge and upon the exceptions and the said judge did then and there deny such motion.

And the said counsel for said plaintiff did then and there except, on behalf of said plaintiff, to such denial of said motion.

And inasmuch as none of said exceptions so offered are made to the rulings, opinion, and decision of the said judge do appear upon the record of said trial, therefore, on the prayer of the said plaintiff, by his counsel, the said judge hath to this bill of exceptions put his seal, according to the statute in such case made and provided, this first day of August, in the year one thousand eight hundred and eighty-nine.

WM. J. WALLACE,
Circuit Judge.

Endorsed: U. S. circuit court. John Mitchell, as administrator, &c., of the estate of Lawrence Mitchell, deceased, against The New York, Lake Erie and Western Railroad Company. Case and bill of exceptions. Herman H. Shook, 132 Nassau St., N. Y. city, plaintiff's att'y. Service of a copy of within case and bill of exceptions admitted this 29th day of June, 1889. Buchanan & Steele, def'ts att'ys. U. S. circuit court. Filed Aug. 3d, 1889. John A. Shields, clerk.

[Endorsed:] U. S. circuit court. Filed Aug. 3, 1889. John A. Shields, clerk.

47 Supreme Court of the United States.

JOHN MITCHELL, as Administrator, &c., of Lawrence Mitchell, Deceased, Plaintiff in Error,
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant in Error.

Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol, in Washington, comes the said plaintiff in error, by Hermon H. Shook, his

attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

First.

That by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff in error against the said defendant in error.

Second.

That by the record aforesaid it appears that the court directed a verdict for the defendant in error, whereas it should have
48 submitted the case to the jury for their consideration.

Third.

That by the record aforesaid and the bill of exceptions it appears that the court refused to charge the jury, as requested by the counsel for the plaintiff in error, as follows, to wit, "It is immaterial for the jury to consider whether the plaintiff's intestate was or was not a trespasser at the time he sustained his injuries," when the court should have so charged.

Fourth.

That by the record aforesaid and the bill of exceptions it appears that the court refused to charge the jury, as requested by the counsel for the plaintiff in error, as follows, to wit, "If the jury find that the defendant by its servants allowed the plaintiff's intestate to go and remain upon the train the defendant was bound to exercise proper care not to injure him while he was there," when the court should have so charged.

Fifth.

That by the record aforesaid and the bill of exceptions it appears that the court refused to charge the jury, as requested by the counsel for the plaintiff in error, as follows, to wit, "While the defendant had a right to expel the plaintiff's intestate from the train, if the jury find that the defendant did not do so, but allowed him to remain, then it owed him the same duty as if he had been a
49 passenger on a regular passenger train," when the court should have so charged.

Sixth.

That by the record aforesaid and the bill of exceptions it appears that the court refused to charge the jury, as requested by the counsel for the plaintiff in error, as follows, to wit: "The fact that the plaintiff's intestate was being carried gratuitously did not relieve the defendant of the duty of exercising proper care to carry him without injury," when the court should have so charged.

Seventh.

That by the record aforesaid and the bill of exceptions it appears that the court refused to charge the jury, as requested by the counsel for plaintiff in error, as follows, to wit: "The defendant is not relieved by the fact that its employees allowed the plaintiff's intestate to ride on this train contrary to express orders," when the court should have so charged.

Eighth.

That by the record aforesaid and the bill of exceptions it appears that the court refused to charge the jury, as requested by the counsel for the plaintiff in error, as follows, to wit: "If the jury find that the servants of the defendant allowed the plaintiff's intestate to ride on this freight train their permission was its permission," when the court should have so charged.

50 Ninth.

That by the record aforesaid and the bill of exceptions it appears that the court refused to charge the jury, as requested by the counsel for the plaintiff in error, as follows, to wit: "If the jury find that by the negligence of the servants of the defendant the plaintiff's intestate was injured and died from the effects thereof the defendant is liable in this action in the absence of contributory negligence on his part," when the court should have so charged.

Tenth.

That by the record aforesaid and the bill of exceptions it appears that the court refused to charge the jury, as requested by the counsel for the plaintiff in error, as follows, to wit: "The burden is on the defendant to prove contributory negligence on the part of the plaintiff's intestate and defendant must establish contributory negligence by a preponderance of evidence," when the court should have so charged.

Eleventh.

That by the record aforesaid and the bill of exceptions it appears that the court refused to charge the jury, as requested by the counsel for the plaintiff in error, as follows, to wit: "It was not contributory negligence on the part of plaintiff's intestate as matter of law to ride on this freight train if permitted to do so by the serv-
51 ants of the defendant," when the court should have so charged.

Twelfth.

That by the record aforesaid and the bill of exceptions it appears that the court refused to charge the jury, as requested by the counsel for the plaintiff in error, as follows, to wit: "The failure of the servants of the defendant to expel the plaintiff's intestate from the train

was equivalent to a permission that he might ride thereon," when the court should have so charged.

Thirteenth.

That by the record aforesaid and the bill of exceptions it appears that the court refused to charge the jury, as requested by the counsel for the plaintiff in error, as follows, to wit: "If the jury find that the plaintiff's intestate while riding on the train was exercising all the care and caution which a person of his years and capacity would exercise under the circumstances, then he was not guilty of negligence," when the court should have so charged.

Fourteenth.

That by the record aforesaid and the bill of exceptions it appears that the court refused to charge the jury, as requested by the counsel for the plaintiff in error, as follows, to wit: "The law does not exact the same degree of care from a minor as from an adult.
52 The caution required from the plaintiff's intestate was according to his maturity and capacity, which is to be determined by the circumstances of the case," when the court should have so charged.

Fifteenth.

That by the record aforesaid and the bill of exceptions it appears that the court refused to charge the jury, as requested by the counsel for the plaintiff in error, as follows, to wit: "Even if the jury should think it contributory negligence on the part of the plaintiff's intestate to ride on this train, if the servants of defendant who were operating the train could, by the exercise of proper care, have avoided injuring him, the defendant is liable," when the court should have so charged.

Sixteenth.

That by the record aforesaid and the bill of exceptions it appears that the court refused to charge the jury, as requested by the counsel for the plaintiff in error, as follows, to wit: "The jury may award such damages as in their good sense and sound judgment the next of kin of the deceased should have," when the court should have so charged.

Seventeenth.

That by the record aforesaid and the bill of exceptions it appears that the court refused to charge the jury, as requested by the
53 counsel for the plaintiff in error, as follows, to wit: "It is not necessary that actual pecuniary loss to the next of kin should be shown," when the court should have so charged.

Eighteenth.

That by the record aforesaid and the bill of exceptions it appears that the court refused to charge the jury, as requested by the counsel for the plaintiff in error, as follows, to wit: "There is no fixed

measure of damages and no artificial rule by which they can be computed," when the court should have so charged.

Nineteenth.

That by the record aforesaid and the bill of exceptions it appears that the court refused to charge the jury, as requested by the counsel for the plaintiff in error, as follows, to wit: "The jury may give such damages as they deem fair and just under the circumstances of the case," when the court should have so charged.

Twentieth.

That by the record aforesaid and the bill of exceptions it appears that the court refused to allow the jury to consider the questions of fact in the case, as requested by the counsel for the plaintiff in error, when the court should so have done.

Twenty-first.

That by the record aforesaid and the bill of exceptions it
54 appears that the court instructed the jury to find a verdict for the defendant, when it should have submitted the case to the jury for their consideration without such instruction.

Twenty-second.

That by the record aforesaid and the bill of exceptions it appears that the jury, not being allowed by the court to consider the questions of fact in the case, rendered a verdict for the defendant.

Twenty-third.

That by the record aforesaid and the bill of exceptions it appears that the court refused to grant a new trial, when it should so have granted such new trial.

And the said plaintiff in error prays that the judgment aforesaid for the errors aforesaid and other errors aforesaid in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff in error, may be restored to all things which he has lost by occasion of said judgment, &c.

All of which is respectfully submitted.

HERMON H. SHOOK,
Attorney for Plaintiff in Error, 132 *Nassau Street, New York City.*

(Endorsed:) Supreme Court of the United States. John
55 Mitchell, administrator, &c., of Lawrence Mitchell, deceased, plaintiff in error, *vs.* The New York, Lake Erie and Western Railroad Company, defendant in error. Assignment of errors. Hermon H. Shook, attorney for plaintiff in error, 132 Nassau street, New York city. Due service of a copy of within assignment of errors hereby admitted August 14th, 1889. Buchanan & Steel, att'ys for def't. U. S. circuit court. Filed Aug. 14, 1889. John A. Shields, clerk.

56 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

JOHN MITCHELL, as Administrator, &c., of Lawrence Mitchell, Deceased, Plaintiff in Error,
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant in Error.

Know all men by these presents that we, Randall G. Cowenhover, of 101 Prince St., in the city of Brooklyn, county of Kings and State of New York, and Joseph August Kennell, of 160 E. 4th street, in the city of New York, county and State of New York, are held and firmly bound unto the above-named The New York, Lake
57 Erie and Western Railroad Company in the sum of two hundred and fifty dollars, to be paid to the said The New York, Lake Erie and Western Railroad Company; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 13th day of August, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas the above-named John Mitchell, as administrator, &c., of Lawrence Mitchell, deceased, plaintiff in error, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge
58 of the circuit court of the United States for the southern district of New York, said judgment being for the sum of seventy-one dollars and forty-two cents:

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs in error shall prosecute his said writ of error to effect and answer all costs if he shall fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

RANDALL G. COWENHOVER. [L. S.]
JOSEPH AUG. KENNELL. [L. S.]

Witness:
HERMON H. SHOOK.

Sealed and delivered and taken and acknowledged this 13th day of August, 1889, before me—
W. W. CULVER,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, } ss.:
City and County of New York,

59 Randall G. Cowenhover, one of the subscribers to the foregoing bond, being duly sworn, says that he is a resident of the city of Brooklyn, county of Kings, State of New York, and

a freeholder therein, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

RANDALL G. COWENHOVER.

Sworn to this 13th day of August, A. D. 1889, before me—

W. W. CULVER,

[L. S.] *Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Joseph August Kennell, one of the subscribers to the foregoing bond, being duly sworn, says that he is a resident of the city, county, and State of New York and a freeholder therein, and that
60 he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JOSEPH AUG. KENNELL.

Sworn to this 13th day of August, A. D. 1889, before me—

W. W. CULVER,

[L. S.] *Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

STATE OF NEW YORK, }
Southern District of New York, City and } ss:
County of New York, }

On this 13th day of August, 1889, before me personally came Randall G. Cowen and Joseph August Kennell, to me known and known to me to be the same individuals described in and who executed the foregoing bond, and severally acknowledged that they executed the same for the uses and purposes therein mentioned.

W. W. CULVER,

61 [L. S.] *Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

The foregoing bond is hereby approved as to form, amount, and sufficiency of sureties.

August 13, 1889.

BUCHANAN & STEELE,
Def't's Att'ys.

The foregoing bond is hereby approved as to form, amount, and sufficiency of sureties.

August 14, 1889.

E. HENRY LACOMBE.

Endorsed: United States circuit court, so. dist. of New York. John Mitchell, as administrator, &c., of Lawrence Mitchell, deceased, plaintiff in error, *vs.* The New York, Lake Erie and Western Rail-

road Company, defendant in error. Bond for costs on writ of error. Hermon H. Shook, att'y for pl'ff in error. U. S. circuit court. Filed Aug. 14, 1889. John A. Shields, clerk.

62 UNITED STATES OF AMERICA, *ss:*

To the New York, Lake Erie and Western Railroad Company:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to the writ of error filed in the clerk's office of the circuit court of the United States for the second circuit and southern district of New York, wherein John Mitchell, as administrator, &c., of Lawrence Mitchell, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable E. Henry Lacombe, judge of the circuit court of the United States for the southern district of New York and one of the judges of said circuit court, this 14th day of August, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

E. HENRY LACOMBE.

63 [Endorsed:] E. & A. A. 852. United States circuit court, so. dist. of New York. John Mitchell, as administrator, &c., of Lawrence Mitchell, deceased, plaintiff in error, *vs.* The New York, Lake Erie and Western Railroad Company, defendant in error. Citation. Hermon H. Shook, att'y for pl'ff in error, 132 Nassau street, New York city. Service of within citation is hereby admitted August 14th, 1889. Buchanan & Steele, att'ys for def't. U. S. circuit court. Filed Aug. 14, 1889. John A. Shields, clerk.

Endorsed on cover: Case No. 13,611. S. New York C. C. U. S. No. 71. John Mitchell, as administrator, &c., of Lawrence Mitchell, deceased, plaintiff in error, *vs.* The New York, Lake Erie & Western Railroad Company. Filed August 22, 1889.

146 U.S. 513

Office Supreme Court U. S.
FILED.
OCT 4 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

JOHN MITCHELL, as Administrator, &c., of LAWRENCE MITCHELL, deceased.
Plaintiff in Error,

vs.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

October Term, 1892.

Number 71.

Brief of Plaintiff in Error.

PRELIMINARY.

This is a writ of error brought by the plaintiff below to review a judgment of the Circuit Court of the United States for the Southern District of New York, entered upon the verdict of a jury, by direction of the Court, in favor of the defendant. (fols. 12, 13, 14.)

The action was brought under an Act of the Legislature of the State of New Jersey, (fols. 29-31,) to recover damages for the death of the plaintiff's intestate, caused by the neglect of the defendant. The occurrence took place in Hoboken, New Jersey, on the 15th day of November, 1887, (fols. 3, 4, 17,) causing the death of the plaintiff's intestate on the 17th of the same month. (fols. 34, 35.) The plaintiff was appointed administrator of the intestate by the Surrogate of the County of New

York, State of New York, on the 2d day of April, 1888. (fols. 25-28.) The action was brought in the Circuit Court for the Southern District of New York, the plaintiff being an alien, (fols. 3, 35,) and the defendant a citizen of the State of New York and an inhabitant of the Southern District of New York, (fols. 3, 8.)

There is no question as to the jurisdiction of the Circuit Court for the Southern District of New York, in this action.

Dennick, adm., v. Central R. R. Co. of New Jersey, 103 U. S., 11.
Leonard, adm., v. Columbia Navigation Co., 84 N. Y., 48.

THE PLEADINGS.

The Complaint alleges (fols. 3-5):

FIRST. The alienage of the plaintiff.

SECOND. The incorporation and citizenship of the defendant.

THIRD. That on the 15th day of November, 1887, Lawrence Mitchell, an infant, was on a coal train of the defendant, by the license of the defendant in Hoboken, New Jersey, when and where by the negligence of the defendant in the management of said train the said Mitchell was thrown from said train by a sudden and violent jerk or jar, and after being so thrown the train passed over his body severing his left leg and thereby so injuring him as to cause his death.

FOURTH. The names of the next of kin of the deceased and their pecuniary injury by his death.

FIFTH. The appointment of the plaintiff as administrator.

The answer (fols. 8-11) denies the allegations of negligence, the jurisdiction of the Surrogate, sets up affirmatively an Act of the General Assembly of the State of New Jersey in reference to jumping off cars while in motion, and alleges that the death of the plaintiff's intestate was caused by his jumping from the train while it was in motion.

On the trial the Complaint was amended so as to lay the damages at $5100. (fol. 17.)

THE PROCEEDINGS.

The cause came on for trial on the 8th day of May, 1889, before the Hon. William J. Wallace and a jury. (fol. 12.)

When the plaintiff and defendant rested (fol. 37,) a motion was made to direct a verdict for the defendant, the plaintiff made certain requests to charge which were refused, the Court directed a verdict for the defendant, and the plaintiff moved for a new trial. (fols. 39-46.)

The plaintiff excepted to the refusals to charge, to the refusal to allow the jury to consider the questions of negligence, to the direction of the verdict, and the denial of the motion for a new trial. (fols. 39-46.)

Errors Assigned.

FIRST. That by the record aforesaid it appears that the judgment aforesaid in form aforesaid given, was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land, the said judgment ought to have been given for the said plaintiff in error against the said defendant in error. [fols. 14, 38, 47.]

SECOND. That by the record aforesaid it appears that the Court directed a verdict for the defendant in error, whereas it

should have submitted the case to the jury for their consideration. [fols. 45, 46, 47.]

THIRD. That by the record aforesaid, and the bill of exceptions it appears that the Court refused to charge the jury as requested by the counsel for the plaintiff in error, as follows, to wit: "It is immaterial for the jury to consider whether the "plaintiff's intestate was or was not a trespasser at the time he "sustained his injuries," when the Court should have so charged. [fols. 39, 48.]

FOURTH. That by the record aforesaid and the bill of exceptions it appears that the Court refused to charge the jury as requested by the counsel for the plaintiff in error as follows, to wit: "If the jury find that the defendant by its servants al- "lowed the plaintiff's intestate to go and remain upon the "train, the defendant was bound to exercise proper care not to "injure him while he was there," when the Court should have so charged. [fols. 39, 48.]

FIFTH. That by the record aforesaid and the bill of exceptions it appears that the Court refused to charge the jury as requested by the counsel for the plaintiff in error as follows, to wit: "While the defendant had a right to expel the plaintiff's "intestate from the train, if the jury find that the defendant "did not do so but allowed him to remain, then it owed him "the same duty as if he had been a passenger on a regular "passenger train," when the Court should have so charged. [fols. 40, 48, 49.]

SIXTH. That by the record aforesaid and the bill of exceptions it appears that the Court refused to charge the jury as requested by the counsel for the plaintiff in error as follows, to wit: "The fact that the plaintiff's intestate was being carried "gratuitously did not relieve the defendant of the duty of "exercising proper care to carry him without injury," when the Court should have so charged. [fols. 40, 49.]

SEVENTH. That by the record aforesaid and the bill of exceptions it appears that the Court refused to charge the jury as requested by the counsel for plaintiff in error as follows to wit: "The defendant is not relieved by the fact that its employees "allowed the plaintiff's intestate to ride on this train contrary

to express orders," when the Court should have so charged. [fols. 40, 49.]

EIGHTH. That by the record aforesaid and the bill of exceptions it appears that the Court refused to charge the jury as requested by the counsel for the plaintiff in error as follows to wit: "If the jury find that the servants of the defendant al- "lowed the plaintiff's intestate to ride on this freight train "their permission was its permission," when the Court should have so charged. [fols. 41, 49.]

NINTH. That by the record aforesaid and the bill of exceptions, it appears that the Court refused to charge the jury as requested by the counsel for the plaintiff in error as follows, to wit: "If the jury find that by the negligence of the servants "of the defendant the plaintiff's intestate was injured and died "from the effects thereof, the defendant is liable in this action in "the absence of contributory negligence on his part," when the Court should have so charged. [fols. 41, 50.]

TENTH. That by the record aforesaid and the bill of exceptions it appears that the Court refused to charge the jury as requested by the counsel for the plaintiff in error as follows to wit: "The burden is on the defendant to prove contributory "negligence on the part of the plaintiff's intestate, and defend- "ant must establish contributory negligence by a preponderance "of evidence," when the Court should have so charged. [fols. 42,50.

ELEVENTH. That by the record aforesaid and the bill of exceptions it appears that the Court refused to charge the jury as requested by the counsel for the plaintiff in error as follows to wit: "It was not contributory negligence on the part of "plaintiff's intestate, as matter of law, to ride on this freight "train if permitted to do so by the servants of the defendant," when the Court should have so charged. [fols. 42, 50, 51.]

TWELFTH. That by the record aforesaid and the bill of exceptions it appears that the Court refused to charge the jury as requested by the counsel for the plaintiff in error as follows to wit: "The failure of the servants of the defendant to expel the "plaintiff's intestate from the train was equivalent to a per-

"mission that he might ride thereon," when the Court should have so charged. [fols. 42, 51.]

THIRTEENTH. That by the record aforesaid and the bill of exceptions it appears that the Court refused to charge the jury as requested by the counsel for the plaintiff in error as follows to wit: "If the jury find that the plaintiff's intestate while "riding on the train was exercising all the care and caution "which a person of his years and capacity would exercise under "the circumstances, then he was not guilty of negligence," when the Court should have so charged. [fols. 43, 51.]

FOURTEENTH. That by the record aforesaid and the bill of exceptions it appears that the Court refused to charge the jury as requested by the counsel for the plaintiff in error as follows to wit: "The law does not exact the same degree of care from a "minor as from an adult. The caution required from the "plaintiff's intestate was according to his maturity and cap- "acity which is to be determined by the circumstances of the "case," when the Court should have so charged. [fols. 43, 51, 52.]

FIFTEENTH. That by the record aforesaid and the bill of exceptions it appears that the Court refused to charge the jury as requested by the counsel for the plaintiff in error as follows to wit: "Even if the jury should think it contributory neg- "ligence on the part of the plaintiff's intestate to ride on this "train, if the servants of defendant who were operating the "train could by the exercise of proper care have avoided "injuring him the defendant is liable," when the Court should have so charged. [fols. 44, 52.]

SIXTEENTH. That by the record aforesaid and the bill of exceptions it appears that the Court refused to charge the jury as requested by the counsel for the plaintiff in error as follows to wit: "The jury may award such damages as in their good "sense and sound judgment the next of kin of the deceased "should have," when the Court should have so charged. [fols. 44, 52.]

SEVENTEENTH. That by the record aforesaid and the bill of exceptions it appears that the Court refused to charge the jury

as requested by the counsel for the plaintiff in error as follows to wit: "It is not necessary that actual pecuniary loss to the "next of kin should be shown," when the Court should have so charged. [fols. 44, 53.]

EIGHTEENTH. That by the record aforesaid and the bill of exceptions it appears that the Court refused to charge the jury as requested by the counsel for the plaintiff in error as follows to wit, "There is no fixed measure of damages, and no artificial rule by which they can be computed," when the Court should have so charged. [fols. 45, 53.]

NINETEENTH. That by the record aforesaid and the bill of exceptions it appears that the Court refused to charge the jury as requested by the counsel for the plaintiff in error as follows to wit: "The jury may give such damages as they deem fair "and just under the circumstances of the case," when the Court should have so charged. [fols. 45, 53.]

TWENTIETH. That by the record aforesaid and the bill of exceptions it appears that the Court refused to allow the jury to consider the questions of fact in the case as requested by the counsel for the plaintiff in error, when the Court should so have done. [fols. 45, 46, 47, 48.]

TWENTY-FIRST. That by the record aforesaid and the bill of exceptions it appears that the Court instructed the jury to find a verdict for the defendant, when it should have submitted the case to the jury for their consideration without such instruction. [fols. 45, 46, 47, 48, 54.]

TWENTY-SECOND. That by the record aforesaid and the bill of exceptions it appears that the jury not being allowed by the Court to consider the questions of fact in the case rendered a verdict for the defendant. [fols. 46, 54.]

TWENTY-THIRD. That by the record aforesaid and the bill of exceptions it appears that the Court refused to grant a new trial when it should so have granted such new trial. [fols. 46, 54.]

Of the twenty-three errors assigned, seventeen have reference to refusals to charge, the remaining six to the direction of the verdict and the refusal of the Court to submit to the jury the consideration of the facts of the case.

The vital question involved in this writ of error, is whether the plaintiff made out a cause of action, and the consideration of this question will comprehend the errors assigned.

STATEMENT OF FACTS.

The facts are brief and simple. On the 15th of November, 1887, (fol. 17) at about half past nine in the evening, (fol. 20) the plaintiff's intestate, a lad about sixteen years old, (fol. 35) his brother, Henry, a young man named Robert Henry, (fols. 23,) and a number of others (fols. 18 to 23), got on a coal train of the defendant at the Bergen end of the tunnel which runs from that place to Hoboken, (fols. 17, 20, 23). It was a frequent occurrence for people to ride through this tunnel on coal trains of the defendant without objection from its servants, (fols. 18, 20, 21, 22, 24). On this occasion the brakemen and conductor saw the people on the train and allowed them to ride, (fols. 18, 22, 23, 24). The train was sixty or seventy cars in length (fol. 18). The passengers were on separate cars (fol. 18) sitting on the coal. Lawrence Mitchell, the plaintiff's intestate, was sitting on the end on top of the car, his feet hanging over down between the cars, (fol. 21). As the train approached First Street there was a sudden jerk which threw the people on the cars into various positions, Lawrence falling down between two cars, (fols. 18, 21, 23). He was found lying alongside the track with one leg off, (fol. 18), and two days after died from the effects of his injuries, (fols. 18, 34, 35).

POINTS.

The Court below erred in directing the jury to find a verdict for the defendant. It should have submitted the case to the jury and charged the plaintiff's requests.

First.

Had this accident happened upon a regular passenger train, there is not the slightest doubt but that a *prima facie* case would have been established by the plaintiff's evidence.

New Jersey Railroad and Transportation Co. v. Pollard, 22 Wall, 341.

Gleason v. Virginia Midland R. R., 140 U. S., 435.
Inland and Seaboard Coasting Co. v. Folson, 139 U. S., 551.

The question whether such a jar as that which threw the plaintiff's intestate from the train constitutes evidence of negligence on the part of the defendant was distinctly held by this Court to be a question of fact for the jury in

The Pollard Case, 22 Wall., 341.

And the question whether the place occupied by the plaintiff at the time of injury was reasonably safe under the circumstances was also distinctly held by this Court to be a question of fact for the jury in

The Folson Case, 139 U. S. 551.

The theory upon which the Court below proceeded was that different rules are to be applied to freight trains from those applicable to regular passenger trains.

But this Court has distinctly and emphatically held that the same rules apply to both classes of trains.

Indiana RR. Co. v. Horst, 93 U. S. 291.
Phila. & Read. RR. Co. v. Derby, 14 How. 468.
N. Y. C. RR. Co. v. Lockwood, 84 U. S. 357.

In the Horst case, 93 U. S., 291, the plaintiff was travelling on a cattle train looking after his cattle when he was thrown from the train by a violent collision. The Supreme Court, Judge Swayne delivering opinion held that the degree of care required in running a cattle train was the same as that required in running a regular passenger train, and reviews many cases in illustration of the rule.

He says: "Life and limb are as valuable, and there is the "same right to safety in the caboose as in the palace car. The "same formidable power gives traction in both cases. The rule "is uniformly applied to passenger trains. The same consider-"ations apply to freight trains. The same dangers are common "to both. Such care and dilligence are as effectual and as im-"portant upon the latter as upon the former: and not more dif-"ficult to exercise."

In the Derby case 14 How., 468, the plaintiff was riding on the locomotive when a collision with another train of the same company occurred. The plaintiff was held entitled to recover notwithstanding he was a free passenger riding on the locomotive instead of in the passenger cars.

The Lockwood case, 84 U. S., 357, was where a drover was riding on a cattle train on a drover's pass. The plaintiff fell through an opening in an embankment built over the Erie canal while he was passing from one car to another. This Court held, Justice Bradley delivering the opinion, that the plaintiff was entitled to the same protection from injury through the negligence of the company as any other passenger notwithstanding he was traveling on a free pass.

"This rule of law has its foundation deep in public policy. "It is approved by experience and sanctioned by the plainest "principles of reason and justice. It is of the greatest import- "ance that Courts of justice should not relax it."

R. R. v. Horst, 93 U. S., 291.

In other jurisdictions also the same high degree of care has been required in reference to the management of freight trains.

I. B. & W. R. R. Co. v. Beever, 41 Ind., 493.
Dunn v. Grand Trunk R. R. Co., 58 Me., 187.
Creed v. Penn. R. R. Co., 86 Pa. St. 139.
Edgerton v. R. R., 39 N. Y., 227.

Mr. Deering in his work on Negligence, Sec. 98, says: "The "rule that a railway company undertaking to carry passengers "is bound to use the highest degree of care and diligence "applies irrespective of any distinction between the different "kinds of trains; there is no reason for relaxing the rule where "one is carried on a freight train."

Second.

Even if the plaintiff's intestate should be regarded as a trespasser at the time he received the injuries which caused his

death the defendant would still be liable if its negligence was the proximate cause of those injuries. It is universally conceded that a trespasser can recover, not only for willful injuries, but also for any want of ordinary care in avoiding injury to him, after his presence is known to the defendant.

Shearman & Redfield on Neg. 4th ed., Secs. 98, 99.
Whittaker Smith on Neg. p. 416 note.

Shearman & Redfield in Sec. 99 say: "We know of no court "of last resort, in which this rule is any longer disputed."

But there never has been any controversy or conflict of authority as to the right of an infant trespasser to recover where injured by the negligence of the defendant, whether the negligence is gross or slight.

Same authorities.

In Sioux City & Pacific R. R. Co. v. Stout, 17 Wall., 657, this Court held that a railway company was not exempt from responsibility for injuries to a child trespasser, arising from the negligence of the company.

In this case the plaintiff a boy was injured on a turn table in the yard of the railroad company while playing there with other boys.

Mr. Wharton in his work on negligence, second edition, sec. 354 says: "Even a trespasser is not withdrawn from the pro- "tection of the law which requires that no man shall negligent- "ly injure another. The carrier if he permits such trespasser "to continue in the carraige, cannot regard him, after such per- "mission, as a trespasser. The carrier has a right to expel the "trespasser at once from the carriage. If the carrier omits to "do this, and if the person in question remains voluntarily with "the carrier's assent, then the trespass passes into a *quantum* "*meruit* contract of carriage. On the other hand, the carrier "is bound, from the time he assents to carry such person to ex- "ercise towards him the diligence, prudence, and skill of a good "carrier in that particular kind of transport; in other words, "the particular kind of diligence, prudence and skill, which the "carrier is bound to exercise towards all other passengers *

"* * * The carrier, who instead of expelling a tres-"passer, permits him to remain in the carriage, enters into a "contract of common carriage with such person; and there is "no test by which we can distinguish the trespasser from the "bona-fide traveller who expects to pay when required. We "must hold that in such case the trespasser, whom the carrier "does not expel from the carriage, stands, so far as concerns "protection from neglect, on the same footing as the ordinary "passenger."

So that in this case if the plaintiff's intestate had been a bald trespasser without any permission whatever either express or implied, from the defendant, given in the first instance, the defendant would still be liable if its negligence caused the injuries which resulted in the death of plaintiff's intestate.

But the evidence shows that the plaintiff's intestate was not a mere trespasser. He was on the freight train by license of the defendant if not by its express invitation. A number of others besides the plaintiff's intestate were on the same train. They were not forbidden to board the train; were not ordered off after they boarded; the train started to pass through the tunnel while they were on, and the conductor and other employees on the train knew of the fact. It is difficult to conceive of a clearer case of license. So that the plaintiff's intestate was a licensee. As such he was entitled to protection against the negligence of the defendant.

Phila. & Read. R. R. Co. v. Derby, 14 How., 468.
Patterson on Railway Accident Law, Secs. 184,189.

Third.

The fact that the plaintiff's intestate was being carried gratuitously did not relieve the defendant from the duty of exercising proper care.

Phila. & Read. RR. Co. v. Derby, ubi sup.
N. Y. C. RR. Co. v. Lockwood, 84 U. S., 357.
Brennan v. Fairhaven, &c. RR. Co., 45 Conn., 284.
Whittaker Smith on Neg., page 309.
Indiana RR. Co. v. Horst, 93 U. S., 291.

Fourth.

Nor would the defendant be exonerated even if it appeared that the employees allowed the plaintiff's intestate to ride on this train contrary to express orders of defendant.

Phila. & Read. RR. Co. v. Derby, ubi sup, where the Court say: "A large proportion of the accidents on railroads are "caused by the negligence of the servants or agents of the com- "pany. Nothing but the most stringent enforcement of disci- "pline, and the most exact and perfect obedience to every rule "and order emanating from a superior, can insure safety to life "and property."

See also Whittaker Smith on Neg., p. 309.
Dunn v. Grand Trunk RR. Co., 58 Me., 187.
Creed v. Penn. etc. RR. Co., 86 Pa. St., 139.
Brennan v. Fairhavan &c. RR. Co., ubi sup.

Fifth.

It will be seen from the authorities already cited that whether the plaintiff's intestate was a trespasser or licensee the liability of the defendant arose the same as if he had been a passenger in a passenger car on a regular passenger train. If the intestate was injured by the negligence of the defendant or its servants or agents he had a cause of action. If he sustained the injuries which caused his death by the negligence of those operating the train by their allowing or producing the sudden jerk or jar which threw him from the train without contributory negligence on his own part and died from the effects of the injuries the plaintiff here is entitled to recover the same as if the intestate had been riding in a palace car and been injured by a similar jar or jerk from the effects of which he died.

So that the simple question on this branch of the case is: Was the intestate injured by the carelessness of the defendant, and that is a question of fact for the jury to determine on all the circumstances of the case.

Sixth.

Contributory negligence in the Federal Courts is a matter of defence to be established by the defendant.

Washington, &c. RR. Co. v. Gladmon, 82 U. S., 401.
Indianapolis, &c. RR. Co. v. Horst, 93 U. S., 291.

Seventh.

At the time the plaintiff's intestate was thrown from the car he was sitting on it on the coal. The suddenness and violence of the jar threw him from the car. Without the jar he could not have been thrown. There was nothing in the position he occupied constituting contributory negligence.

In the case of Farlow v. Kelly, 103 U. S., 288, where the plaintiff was an adult it was held by this Court that "it is not "contributory negligence for a passenger to ride with his elbow "on the sill of an open window, when by a collision his arm is "jarred outside of the car and broken."

In The New Jersey R. R. & Transportation Co. v. Pollard, 22 Wall., 341, the plaintiff a lady of adult years as the train on which she was a passenger, was approaching the depot was standing, her limbs against the seat from which she had just risen engaged in fixing her little girl's hair, preparatory to leaving the cars; the train was moving slowly and about to enter the depot; there was then a jerk or lurch or concussion of the cars which threw her backward so that the lower part of her spine struck against the arm of the seat causing her serious and permanent injuries. This Court held that she was not guilty of contributory negligence, as matter of law.

So that if the plaintiff's intestate had been an adult, his acts, his position at the time of the jar, would not constitute contributory negligence either in law or fact.

But he was a minor, only sixteen years old. If, as an adult, he was not guilty of contributory negligence, certainly as a

minor he would be free from that charge. The rule of law in regard to negligence is always relaxed in favor of an infant. There is no fixed age when children are bound to exercise the same care as grown people. The caution required is according to the maturity and capacity of the child, and this is to be determined by the circumstances of the case and is a question for the jury.

Washington, &c., R. R. Co. v. Gladmon, 82 U. S. 401.

Sioux City & Pacific R. R. Co. v. Stout, 17 Wall., 657.

Taking all the circumstances of this case into consideration did the intestate do anything or omit to do anything which a boy of his age and capacity would or would not have done? What boy of his age would have refrained from riding on this car when allowed by a conductor or brakeman? How would any boy or man have acted in any different or more careful manner than he did? Even if it was negligence for him to be on the train, the mere fact of his being on the train was not the proximate cause of the accident. The rule is well settled and has been enforced in many railroad cases irrespective of the question of infancy, that notwithstanding the negligence of the injured party in being in a place of danger, if the company failed to exercise proper care after becoming aware of the presence of the person to aviod injuring him, it is liable.

Shearman & Red. on Neg., Secs. 99 and 483.
Patterson's Railway Accident Law, Sec. 204.

If in this case the intestate had been on the train without license the engineer becoming aware of his presence would have been bound to exercise care not to injure him. He must have known that boys were constantly in the habit of riding on the train. He was bound therefore to exercise care in their behalf.

Sherman & Red. on Neg., Sec. 484, 4th ed.

Eighth.

If the case on the evidence was to be disposed of by the Court, the plaintiff and defendant having both rested, the direction of the Court should have been that the jury find a verdict for the plaintiff and assess the damages. The Court having directed a verdict for the defendant erred in respect to the First error assigned, (fols. 47, 38.) But if the Court should not have directed a verdict for the plaintiff it should have submitted the case to the jury for their consideration. Not having done so, error was committed in reference to the Second, (fols. 47, 45) Twentieth, Twenty-first and Twenty-second (fols. 53, 54, 55, 45) errors assigned.

Ninth.

The Court should have charged the requests made by the plaintiff. Not having done so it erred in respect to the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth and Nineteenth errors assigned, (fols. 48–53, 39–45).

The questions involved in the Third to the Fifteenth errors assigned have been comprehended in the First ~~and~~ Seventh Points of this Brief, and further consideration of them seriatim is unnecessary. It is sufficient to say that if the Court erred in directing a verdict for the defendant, it also erred in refusing to charge the jury as requested.

The Sixteenth, Seventeenth, Eighteenth and Nineteenth errors assigned (fols. 52, 53, 44, 45,) refer to the question of damages, but as a discussion of that question may be immaterial or improper on this hearing, it will be unnecessary to refer to any authorities.

Tenth.

The judgment should be reversed and a new trial ordered.

HERMON H. SHOOK,
Of Counsel for Plaintiff in Error.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1892.

TERM No. 71.

JOHN MITCHELL, AS ADMINISTRATOR, &C., OF LAWRENCE MITCHELL, DECEASED,

Plaintiff in Error,

VS.

THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

CHARLES STEELE,
WILLIAM D. GUTHRIE,
For Defendant in Error.

DOUGLAS TAYLOR, Law Printer, 8 Warren St., New York.

Supreme Court of the United States.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOHN MITCHELL, as Administrator, &c., of Lawrence Mitchell, deceased,
Plaintiff in Error,

against

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

October Term, 1892.
Term No. 71.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The plaintiff in error, alleging that his son's death was caused in the State of New Jersey, by the defendant's negligence, brings this action for damages under the statute of that State providing for a recovery in such a case.

The defendant is engaged in the operation of a railroad, extending from Buffalo and other points in the West, to its terminal at the Jersey City water front, opposite the City of New York. About a mile back from the water front, a steep hill rising abruptly, renders it necessary to

approach from the other side of the hill through a tunnel about a mile long, known as the Bergen Tunnel. This tunnel belongs to the railroad company, and is used exclusively for the passage of its trains, no provision being made in it for pedestrians or vehicles, which are compelled to follow the longer and steeper roads over the hill having no connection with the premises of the railroad company. Every train of the defendant necessarily passes through the tunnel in reaching its terminal at Jersey City; and in order to guard against accident, trains come to a full stop at the western or far end, before being allowed to go through.

About half-past nine o'clock, on the evening of November 15, 1887, a train, consisting of sixty or seventy loaded coal cars, was standing at the western end of the tunnel, waiting for its turn to go through and proceed to the defendant's freight station at Hoboken, on the river front. The plaintiff's son, with some other boys, who had been out in the country, and were walking home towards Jersey City, approached, and finding the train standing there, climbed upon the coal cars, intending to ride on the train through the tunnel, to Hoboken, and thus save themselves the trouble and fatigue of walking over the hill (folio 18). The boys sat upon the train for some twenty minutes, when one of the party remarked: "I am getting tired; we had better walk home. This train don't go through." To this another of the party rejoined: "I will ask the next brakeman passing." A brakeman passed, but one of the boys said: "Don't ask him, he might throw us off." The other boy said, however: "We will run our chances; we might as well be thrown off the train as to sit here all night." Shortly afterwards, a man with a lantern came along, and one of the boys asked: "Will you please tell us what time this train is going?" The man said: "I

don't know; I guess it is going pretty soon now;" and the train did go about fifteen minutes later (fol. 18).

The statement in the brief for plaintiff in error that "on this occasion the brakeman and conductor saw the people on the train and allowed them to ride" is incorrect. (Brief for Plaintiff in Error, p. 8.) The only testimony on the subject is that quoted above except that the witness Henry testified (at fol. 24): "The brakeman passed me and saw me on the train." There is absolutely no evidence that the conductor saw any of them or knew they were on the train.

The boys were sitting on separate cars, one on each car, so that they could jump off quickly, in case they were discovered (fol. 18). The plaintiff's son sat upon the top of the end of the car with his legs hanging over between it and the adjoining car. Their plan was to jump off the train, while it was in motion, at First Street (fols. 19, 23, 24), which would be reached before the train came to a stop at the Hoboken station.

When the train reached Ferry Street, however, which was one block before it got to First Street, there was a jerk or jar, as is usual when a long freight train is slackening or increasing its speed (fols. 21, 24). The plaintiff's son was seen to disappear from the place where he was sitting (fol. 18), and a short time afterwards was found lying alongside the track, with one leg cut off. These boys had ridden on such coal cars before, but they knew that they had no right to do so, and would be put off if they were seen (fol. 20). They had never gotten permission from anybody to ride upon the trains (fol. 21), nor does the testimony show that on this occasion any one connected with the railroad company even saw them upon the train after it started. One of the boys testified that some time before it started, he asked a man who passed by with a lantern, what time the train was going (fol.

18), but there is nothing to show that this man was a brakeman, or that he was connected with this train, or was even an employe of the company. The same witness testified (fol. 22): "I don't know whether they were connected with that special train, or in the employ of the company; they were brakemen, I know, because they had lanterns and were walking up and down." It appeared that there were "a lot of cars there," although the witness did not know whether the locality was a railroad yard or not (fol. 24). There is nothing whatever to show that it was the defendant's yard or that any of the brakemen referred to were in the defendant's employ, or even that it was operating the train.

No further testimony was introduced as to the kind of jerk that the train gave, except that it was like the jar occasioned when the train increased or diminished its speed (fols. 21, 24). There is no suggestion that it was anything more than the usual and unavoidable jar which occurs under such circumstances. Nor is there any evidence to show whether the boy Mitchell fell off the train, or was thrown off by the jerk. The other boys were not thrown off. The train was simply proceeding in its ordinary way, and no employé on the train knew of the occurrence until afterwards.

No testimony was offered by the defendant, and both parties thereupon resting, the defendant's counsel asked the Court to instruct the jury that, upon the testimony in the case, there was no evidence of negligence on the part of the defendant which caused the death of the deceased, and also that the evidence showed affirmatively that the deceased was guilty of contributory negligence, and therefore they asked the Court to direct a verdict for the defendant (fol. 38).

The Court said: "I will direct a verdict for the defendant, on the ground that there is not sufficient evidence to jus-

tify a recovery upon the case as it stands. There is not sufficient evidence of negligence on the part of the defendant, and the evidence proves concurring negligence on the part of the deceased " (fol. 38).

THE ASSIGNMENT.

An extended assignment of errors is made in the plaintiff's brief, but the argument seems to rely only upon two, namely, that the Court erred in not submitting to the jury the questions as to—

I. The defendant's negligence and

II. The deceased's concurring negligence.

ARGUMENT.

THE COURT HAD THE POWER TO DISPOSE OF THE CASE BY DIRECTING A VERDICT FOR THE DEFENDANT IF THE EVIDENCE WAS NOT SUFFICIENT TO SUPPORT A VERDICT FOR THE PLAINTIFF.

It is not sufficient to take a case to the jury that there is some evidence; there must be *sufficient* evidence to support a verdict in case it should be rendered. In Pleasants *vs.* Fant, 22 Wallace, 116, Mr. Justice Miller said, at page 120:

> "But as was said by this Court in the case of the Improvement Company *vs.* Munson (14 Wallace, 448), recent decisions of high authority have established a more reasonable rule that in every case, before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing, upon whom the *onus* of proof is imposed. * * * It is the duty of a court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in

the conduct of a trial. * * * In the discharge of this duty, it is the province of the Court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor; that is the business of the jury. But, conceding to all the evidence offered the greatest probative force, which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the Court after a verdict to set it aside and grant a new trial. Must the Court go through the idle ceremony, in such a case, of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff, that verdict should be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be that if the Court is satisfied that conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the Court should say so to the jury."

Also Merchants' Bank *vs.* State Bank, 10 Wall., 604, 637.

Oscanyan *vs.* Arms Co., 103 U. S., 261, 266.

The only question, therefore, before this Court is, "Would the evidence have been sufficient to support a verdict for the plaintiff if the jury, upon the case being submitted to them, had found in his favor?"

In order to establish a *prima facie* case for the plaintiff it was necessary—

I.—That the evidence should tend to establish actionable negligence on the part of the defendant.

II.—That it should not prove affirmatively, concurring negligence on the part of the deceased.

In either aspect of the case the plaintiff must fail, for the record not only fails to disclose any facts tending to show a failure by the defendant to exercise due care, but also clearly establishes the deceased's concurring negligence.

I.—THERE WAS NO EVIDENCE OF NEGLIGENCE ON THE PART OF THE DEFENDANT.

The only evidence offered was that while the coal train was in motion, proceeding upon its way, there was a jerk or jar as if the train was "slackening or swiftening its speed" (fol. 21), or as if the "engine pulled ahead" (fol. 24).

The contention of the plaintiff in error seems to be that the deceased, having got upon the defendant's coal train in the night-time without its knowledge, an obligation thereby became imposed upon the defendant, at its peril either to discover his presence there and put him off, or else manage its train so as to render it perfectly safe for one attempting to ride in a position of extreme danger, and that its failure to do so was negligence.

No one would say under ordinary circumstances that the occurrence of such a jerk or jar as is described would constitute any evidence of negligence, in the operation of a freight train, nor does the counsel for plaintiff in error apparently claim that it would; but he gravely argues, that in this case a different rule should prevail because the plaintiff's son was on the train, and he claims that the defendant, by the mere fact of the deceased getting on its coal train, became bound to run that train as skilfully and smoothly as though it were a passenger train of Pullman cars (Brief for Plaintiff in Error, p. 13). No authority is adduced as a precedent for such a novel proposition, and it is plain there can be none. The cases cited tend in no way to support it. The principles established by those decisions are undoubtedly the law, but they have no bearing upon the facts disclosed by the record. There can be no question as to the rule established in this Court, that if a carrier knowingly receive a person for transportation upon a freight

train and then injure him through *negligence*, the carrier would be liable just as much as if the train had been a passenger train. But the point is, what is negligence? What might be considered negligence in the operation of a passenger train, by no means necessarily constitutes a want of due care in running a freight train. For example, a passenger, on a passenger train, injured in a collision that might have been avoided if the train had been equipped with air-brakes, would, by proving that fact alone, establish a *prima facie* case of negligence against his carrier. But if he were upon a freight train, the absence of such brakes could not be asserted as even evidence of want of due care.

It is true, as has been said by this Court (Indianapolis R.R. Co. *vs.* Horst, 93 U. S., 291, at p. 296), that "life and limb are as valuable, and there is the same right to safety in the caboose as in the palace car." But a few lines further on, the Court explains:

> "The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business. It does not, for instance, require, with respect to either passenger or freight trains, steel rails and iron or granite cross-ties, because such ties are less liable to decay, and hence safer than those of wood; nor upon freight trains, air-brakes, bell-pulls, and a brakesman upon every car; but it does emphatically require everything necessary to the security of the passenger upon either, and reasonably consistent with the business of the carrier and the *means of conveyance employed.*"

In other words, the care to be exercised by the carrier must be proportioned to the known requirements of the situation. Neither impossibilities nor unreasonable caution are to be required. As is said in Wharton on Negligence, 2d Ed., § 354, if the carrier knows of a trespasser's presence on the train, and omits to expel him,

> "the carrier is bound from the time he assents to carry such person to exercise towards him the diligence, prudence and skill of a good carrier *in that particular kind of transport.*"

No human skill has yet been able to devise any practical means of running a freight train consisting of sixty or seventy loaded coal cars, without a jerk or jar. There is, necessarily, a jar in starting, stopping, and in every change of speed of the train, or grade, however slight, in the railroad. If the plaintiff's son chose to ride upon such a train he could not assume that its method of operation would be at once altered. He was only entitled to the exercise of the skill and prudence usual in that particular kind of train.

This rule is well settled.

In Reber *vs.* Bond, 38 Fed. Rep., 822, the Court said, at p. 824:

> "The duties of the conductor and other employés operating the train are different from those on a passenger train. Freight trains are more difficult to manage and control than passenger trains, and consequently much more liable to accidents. *The slacking and taking out the slack, the jars and jerks are unavoidable in the one, and unknown, almost, in the other. Those who prefer travelling on freight trains take all these incidental risks.*"

And the fact that these jerks and jars are unavoidable is so well known that testimony on that point is unnecessary.

In Chicago, &c., R.R. Co. *vs.* Hazzard, 26 Ill., 373, a passenger, upon a freight train, who had paid his fare, was thrown by a sudden jerk or jar of the train from the caboose, where he was riding. The Court held that such a jar was not negligence, and said, at p. 378:

> "When running slowly, the speed having been suddenly slackened, the train has closed up on the engine, and in drawing it out again, by letting on steam, there must be a jerk. *It needs no witnesses to prove this; it is palpable to the most careless observer.* The longer the train is, the more violent must be the jerk. * * * *Jerking then is inevitable.*"

So in Wallace *vs.* West. North Co. R.R., 98 N. C., 494, a passenger upon a freight train, while standing in the caboose, was thrown down by a sudden jerk of the train,

and sought to recover damages for the injuries received from the fall. The Court held that it was unnecessary to consider the question of the company's negligence, for the plaintiff was clearly guilty of contributory negligence, and said:

> "An act may be negligent or not according to the attendant circumstances. An act upon a regular passenger train, with air-brakes and other appliances to secure smooth and comfortable, as well as safe, travel, may not be at all negligent in the passenger, while the same act in a caboose attached to a freight train might be careless and negligent. *It is a fact of common knowledge* that even on a passenger train, with every appliance for comfort and safety that can be devised, *there is more or less of jar or jerk* incident to the starting and stopping of trains; and it is in evidence in this case that such jerks and jars are much greater on freight trains, and necessarily so by reason of their character. The passenger on such a train assumes the ordinary risk and discomfort incident thereto."

So in Smith *vs.* Richmond & Dan. R.R. Co., 99 N. C., 241, it was held that a passenger on a mixed freight and passenger train could not recover for damages received by being thrown down by a jerk or jar of the train, because such things were to be anticipated on that kind of a train.

In Perkins *vs.* Chicago, &c., R.R. Co., 60 Miss., 726, a passenger upon a freight train sought to recover damages for personal injuries, but the Court, holding that no negligence was proven, said:

> "They who take passage on such a train cannot expect, and have no right to demand the conveniencies and attention required with respect to passenger trains."

In Harris *vs.* Hannibal, &c., R.R. Co., 89 Mo., 233, it was held that a passenger on a freight train, riding in the caboose in a standing position and thrown violently to the floor by a sudden jerk made in coupling the train, could not recover because such jerks were to be reasonably expected, and it was, therefore, contributory negligence on his part not to have anticipated and guarded against such an occurrence.

In Merrill *vs.* East R.R. Co., 139 Mass., 238, it was held that it is no evidence of negligence that deceased was thrown from the platform of a swiftly moving train by the swaying of the train. His position was well known to be unsafe, and the company could not be said to be negligent merely because he was injured.

II.—THE DECEASED WAS A MERE TRESPASSER.

In every case cited by the plaintiff, and even in those above referred to, there was either express invitation or permission to ride; there was knowledge by the carrier that the passenger was being carried upon the train, and there was a place provided for the carriage of passengers.

In this case, however, there was no invitation or permission to ride, no knowledge by the defendant that the deceased was upon the train, and no place provided for any one to ride.

The deceased was a mere trespasser, and as such the measure of duty owed him by the company was materially different from what it would have been if he had been upon the train by the defendant's permission. The difference in the degree of care to be exercised towards passengers as distinguished from mere strangers or trespassers is well recognized.

In Hutchinson on Carriers, 2d ed., § 553, it is said:

> "The carrier is not under the same degree of obligation as to care and diligence to guard against injuries to strangers as he is in case of those against passengers. His duty to the former is governed by the general principle of law that every one is obliged, upon considerations of humanity and justice, to conform his conduct to the rights of others, and in the prosecution of his lawful business to use every reasonable precaution to avoid their injury."

So, in *Chicago, &c., R.R. Co.* vs. *Mehlsack*, 131 Ill., 61, at p. 64, the Court said:

> "A common carrier of passengers is not under the same obligation as to

care and diligence in guarding against injuries to strangers, and especially to trespassers, that it is in guarding against injuries to passengers."

In R.R. Co. *vs.* Stout, 17 Wall., 657, Mr. Justice Hunt said, at p. 661:

"While a railway company is not bound to the same degree of care in regard to mere strangers, who are unlawfully upon its premises, that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts."

In the recent case of Schneider *vs.* R.R. Co., 133 N. Y., 583, at p. 588, the Court said:

"The rule of liability requires a carrier of passengers to exercise the greatest diligence to secure them safe transportation. But the carrier is not an insurer of their safety. The plaintiff was not a passenger of the Houston Street Company, and hence the high degree of vigilance demanded of a carrier was not demanded in this case."

So it has been repeatedly held that even to one lawfully upon its premises a carrier owes only the duty of not injuring him by any deliberate or wanton act, and is under no obligation to take precautions for his safety.

In Nicholson against Erie Railway Company, 41 N. Y., 525, the plaintiff's intestate was crossing the defendant's tracks, under a license which arose from the fact that, for many years, persons had been allowed to cross at this point with the knowledge and consent of the defendant. As he reached the track, some cars which had been left standing and on which the defendant's brakeman had negligently omitted to set the brakes so as to secure them properly, ran down the track and struck the plaintiff, injuring him severely. In holding that there could be no recovery, the Court said, at page 532:

"The defendant owed the intestate no active duty; it owed him no duty whatever, except such as every citizen owes another. It had no right, intentionally, to injure him, and would be liable if it heedlessly or carelessly injured him while performing its own business. It owed him a duty to abstain from injuring him either intentionally or carelessly; but it did not owe him the duty of active vigilance to see that he was not injured while upon its line, merely by permission for

his own convenience. If the point where the intestate was killed had been a public highway, or if, at the time, he had been a passenger in a car upon the main track, and he had been injured by collision with the cars coming down the branch track, or if in any other way he had been not only lawfully but in the exercise of a right at that point, the defendant, would have owed him a duty to see that the cars upon the branch track were properly secured, but as it was, they owed him no duty, and cannot be charged as to him with negligence in not blocking or fastening the cars. * * * (at p. 540.) It is sought to hold the defendant liable, upon the ground that it owed the duty to the intestate to know that the brakes were not set, and then to set them. The only use of this branch track was for the running of the cars. The cars were properly upon it. The intestate, when he crossed the track, knew its purpose, and he had no right to claim of the defendant that it should see that he was not injured while under its license he was passing over the track by the omission of any active vigilance and care. He had the right to claim that it should not purposely or carelessly injure him, but he could not ask them to be active to ward off from him the perils of the track. Hence I conclude that the Judge presiding at the trial erred in holding that the defendant owed the intestate the duty to set the brakes.

But if it should be admitted that the defendant owed some duty to the intestate, for what degree of carelessness would the defendant be held liable? To persons riding in its cars or travelling upon a public highway and crossing a railway track, a railroad company is justly held responsible for the greatest degree of vigilance and care. But the same rule, it seems to me, cannot apply to a case like this. Here the intestate was passing over the track by permission. The defendant had entered into no contract with him and had no legal relations with him. * * * (at p. 541.) If the defendant was responsible for any care to the intestate, it certainly was ordinary care only, and the Court erred, under all the circumstances of this case, in holding, as a matter of law, that the case of negligence was made out against the defendant by simply showing that the brakes were not set."

See also

Sutton *vs.* New York Central R.R., 66 N. Y., 243.

Byrne *vs.* New York Central R.R., 104 N. Y., 362.

Larmore *vs.* Crown Point Iron Company, 101 N. Y., 391.

Donahue *vs.* State, 112 N. Y., 142.

Cusick *vs.* Adams, 115 N. Y., 55.

In Sweeny *vs.* Old Colony Railroad, 10 Allen, 368, the question was presented as to the liability of a railroad company for injuries to one using its crossing by permission, and in discussing the difference between the duty owed by a carrier to a mere naked licensee and that owed to a passenger, the Court said, at page 373 (Bigelow, C. J.):

> "A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident; the gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared and allowed to be so used. The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition suitable for such use, and for a breach of this obligation, he is liable in damages to a person injured thereby."

So in Severy *vs.* Nickerson, 120 Mass., 306, where a laborer employed in loading ice on board a vessel from the wharf, after finishing his work went on board the vessel for the gratification of his curiosity and there fell down an open hatchway and broke his leg, it was held that he was a mere intruder and that the owners of the vessel were not liable for the injury. Devens, J., said, at page 307:

> "There is no duty imposed upon an owner or occupant of premises to get them in a suitable condition for those who come there for their own convenience merely, without any invitation, either expressed or which may fairly be implied from the preparation and adaptation of the premises for the purpose for which they are appropriated.'

But the testimony shows that the boys knew they were trespassing and had no right or permission to be upon the

train. At folio 20, the witness Schubert testified as follows:

"By the Court:

Q. You said on your direct examination that some remark was made about the brakeman driving you off after you had waited awhile on this train.

A. I said that Henry said, 'Won't they put us off if we ask them what time the train will go through?'

Q. You rather expected they might?

A. *That is what we expected; we run the chances.*"

It is plain, therefore, that even if it could be said that under certain conditions, the fact of a jerk or jar occurring might tend to prove negligence as towards a passenger, it could in no view of the case sustain or support a recovery in favor of the deceased to whom the defendant owed no duty of protection.

The plaintiff, it is true, claims that the deceased was upon the train by the company's license, but the testimony is wholly insufficient to sustain that contention. One of the witnesses testified to a conversation with a man walking on the ground and carrying a lantern as to the time the train might start (fol.18). But there was no evidence that the man had anything to do with the train, and even if there was, such evidence would not be sufficient to prove notice to the defendant that the deceased intended to ride on the train (fol. 22). The western end of the tunnel was a busy place, many people passing and repassing just as the boys were. There was no reason to assume because they were on the train while it was stationary, that they were going to remain there after it started (fol. 24). The natural inference from such a question would be that the interrogator desired to get off the cars before the train started, and not that he intended to remain on the train in a position which, while perhaps not dangerous when the train was standing, would plainly be most perilous when it was in motion. The

plaintiff's contention seems to be that the company was bound to examine its train before it started and to put off any one attempting to ride, but it would be an extraordinary rule of law which would impose upon a carrier the obligation, at its peril, of discovering two or three boys scattered along a coal train, consisting of sixty or seventy cars, upon a dark night.

But even if it appeared that the man seen by the boys was a brakeman and connected with the train on which they rode, his acquiescence in their remaining on the cars cannot bind the defendant. There is absolutely no evidence that the brakeman had any authority in the matter, and there can be no presumption that he was authorized to permit passengers to ride upon a train manifestly dangerous and unfit for such a purpose. This rule is abundantly established by authority.

In *Chicago, Burlington, &c., R.R. Co.* vs. *Casey*, 9 Bradwell (Ill. App. Court), 632, a boy, who claimed that the engineer had given him permission to ride upon a freight train, was killed by being knocked off the train by an overhanging platform. The question was, whether the fact that the engineer gave the boy permission to ride entitled him to be upon the train. The train was a freight train, and the Court held that the engineer could not be presumed to have any authority to permit any one to ride upon it. They said, at page 640:

> "The system by which railway companies conduct their business of carrying passengers and freight, has now been so long in operation, and is being conducted with such a degree of uniformity, that its general features must be presumed to be known and understood by the public. Among these, may be mentioned the division of their freight and passenger business into two distinct departments, and the admission of passengers upon freight trains only under well-known limitations and restrictions, or their entire exclusion therefrom. * * * It is a fact with which the public must be presumed to be familiar that the employés of an ordinary railway train consist of a conductor, an engineer and one or more brakemen, and that each of these is charged with his own peculiar

duties and powers. The conductor is the superior officer, and has general charge and control of the train, admitting and discharging passengers, collecting fares, receiving and discharging freight, and directly representing the company in its intercourse with the public. The duties of the engineer are subordinate, and of an entirely different character. His place is on his engine, and nowhere else, and his duties are limited to running and managing his engine. With the admisson or discharge of passengers he has nothing to do, except so far as the proper management of his locomotive may furnish them an opportunity for getting on and off the train. No authority beyond this can be inferred from the usual course of business on railway trains or from the powers which locomotive engineers usually have and exercise. * * * (at p. 641) The engineer, then, in giving the boys permission to ride, acted not only without actual authority from the company, but also without any authority, which third persons had a right to infer from the nature and circumstances of his employment; in other words, without any apparent authority. * * * (at p. 642) The transportation of passengers was entirely foreign to the business which the train hands were employed by the company to transact. Had even the conductor given the boys permission to ride on such a train, it is, to say the least, doubtful whether his act would not have been beyond the scope of his employment, so as to prevent an application of the maxim, *respondeat superior*. But certainly the engineer, whose duties were limited to driving the engine by which such a train was propelled, could not, by any possible implication, be clothed with authority to give such permision."

So in *Stringer* vs. *Mo. Pac. R'y Co.*, 96 Mo., 299, it was held that one who had been invited by the brakeman of a freight train to ride upon the engine could not recover damages for personal injuries received while in that position.

In *Waterbury* vs. *N. Y. C. & H. R. R.R. Co.*, 17 Fed. Rep., 671, 673, Wallace, J., said:

"Undoubtedly, the presumption of law is, that persons riding upon trains of a railroad carrier, which are palpably not designed for the transportation of persons, are not lawfully there; and if they are permitted to be there by the consent of the carrier's employés, the presumption is against the authority of the employés to bind the carrier by such consent."

In *Eaton* vs. *D. L. & W. R.R. Co.*, 57 N. Y., 382, the plaintiff was invited by the conductor of a coal train to ride upon the train, and, while so riding in the caboose, was injured. The question was, whether the conductor

had such authority as would make his invitation to the plaintiff to ride binding upon the company. The Court held that he had not, and that the fact that the train was a coal train, evidently not adapted for passengers, was notice to the plaintiff that the conductor had no such authority. They said, at page 389:

> "The remaining enquiry is, whether notice to a supposed passenger will not be implied from the nature and apparent division of the business. It would seem so. The matter will be simplified by supposing, in the outset of the discussion, that this had been a coal train without any caboose attached. Under such circumstances, although a wayfarer had taken a gratuitous ride with the conductor's assent upon one of the coal vans, happening for the moment to be empty, so that he could improvise a seat, he could scarcely be deemed a passenger, and the defendant, as to him, a carrier. The presumption is that a person on a freight train is not legally a passenger; and it lies with him who claims to be one to take the burden of proof to show that under the special circumstances of the case, the presumption has been rebutted. * * * (at p. 391). The caboose was not fitted up in the manner usual in passenger cars. Its general appearance showed it to be exclusively designed for the use of the defendant's servants. The plaintiff could not have been misled, as he paid no fare. The conclusion is, that there was nothing in the attendant circumstances in the present instance to show that the conductor could, by inviting the plaintiff to get upon the train, create between him and the defendant the relation of passenger and carrier."

Nor does the fact that the deceased or other boys had ridden upon the trains on previous occasions avail.

In *Hickey* vs. *Boston & Lowell R.R.*, 14 Allen, 429, the plaintiff's intestate was killed while riding on the platform of a car in a position which he and others had before occupied without interference from the employés of the company. It was held that the deceased was guilty of contributory negligence and could not recover, and that the actual permission of the employés to his occupying a position manifestly dangerous did not avail to excuse him. The Court said, at p. 433:

> "If they (passengers) voluntarily take exposed positions, with no occasion therefor, nor inducement thereto, caused by the managers of the road, except a bare license by non-interference, or express permission of

the conductor, they take the special risks of that position upon themselves."

In *Files* vs. *Boston & Albany R.R. Co.*, 149 Mass., 204, the plaintiff, by invitation of the conductor of a freight train, was getting upon the locomotive engine in order to ride in the cab thereof, when the engine started, throwing him off and occasioning injuries for which he sought to recover damages. It appeared that he had ridden on the engine before, and that he had seen others do so. Upon this evidence it was contended that a usage was shown which justified the plaintiff in supposing that he was entitled to ride upon the conductor's invitation. The Court held, however, that he could not recover, and said, at page 206:

"If a person takes an exposed position upon a train not designed for the use of passengers, he himself incurs the special risks of that position, whether he takes it by the license, non-interference, or even express permission of the conductor. * * * The locomotive engine was obviously not intended for passengers, and he had in his charge no vehicle, nor any part of a vehicle, in any way adapted for passengers. In riding for his own convenience in a place where it was not safe or prudent to ride, the plaintiff took on himself the risk of so doing, whether he did so by the license or on the invitation of the conductor. *It was not within the apparent scope of the freight conductor's authority to permit persons to ride on his freight train, far less on the locomotive engine thereof; nor can the fact that he had allowed the plaintiff to do so at a previous time, and also that the local freight agent and a conductor were known by the plaintiff to have ridden on the locomotive engine, make the defendant responsible for accidents which occurred thereby.*"

In *Morris* vs. *Brown*, *111 N. Y.*, 318, it was sought to recover damages for the death of the plaintiff's intestate while riding upon a car belonging to the defendant used in the work upon which the deceased was employed. It appeared that the defendant was under no obligation to allow the deceased to ride upon the car, and that he had never had permission to do so, but had done so on several occasions without interference. The cars were not furnished for any such purpose, but merely for removing

rocks and stones from the work. The Court said, at page 326:

> "As they were not furnished for such use, so there was no permission from the defendants, or any one of them, that they might be so used. But it is said this permission might be implied, because the intestate and others had before ridden upon the cars. Without permission from or duty on the part of the defendants to give it, I cannot see how that result follows. On the contrary, a person so using the car at each time took upon himself the risk, and must abide by its condition and the quality of the attendant at the time he so used it, and was entitled only not to be led into danger."

It is plain, therefore, that, even assuming that the brakeman upon the train had given the deceased express permission to ride on this and other occasions, he was still a mere trespasser and the defendant was under no duty to protect him from harm.

The plaintiff relies upon the case of Railroad Company *vs.* Pollard, 22 Wallace, 341; but that case differs in every essential point from the case at bar. There the train upon which the plaintiff was riding was a regular passenger train, the plaintiff was a passenger, the train bumped into a car which was standing on the track, and there was testimony tending to show that the jar occasioned thereby was greater than what is usual and unavoidable, and that it was unusual and violent. There was also testimony that the company did not have its cars provided with a buffer, which was in common use and particularly adapted to prevent the precise occurrence which caused the accident (page 344). Of course, such a case was properly submitted to the jury; but in this case, the train was a freight train, the deceased was a mere trespasser, and the only evidence adduced is, that, while the train was proceeding in its usual way, there was a jerk or jar which seemed like that caused by the train swiftening or slackening its speed and which it is well known is unavoidable. There are no conceivable circumstances under which this testimony could be said to make out

such a *prima facie* case of negligence as to require its submission to the jury.

II.—AS TO THE DECEASED'S CONCURRING NEGLIGENCE, THE CASE IS EQUALLY PLAIN.

He was a boy of some seventeen years old, and is described as bright, active and intelligent (fols. 35–6). He had, apparently, undertaken many times before such adventures as the one which caused his death (fols. 20, 24), and it cannot be imagined that he was ignorant of the danger of his situation. If it be not negligence, as a matter of law, for one to ride upon a loaded coal train, consisting of sixty or seventy cars, sitting upon the top of the car with his legs hanging over the end, this position having been voluntarily assumed, and without suggestion or permission from any one, it is difficult to conceive of any circumstances which would necessarily impute a want of ordinary care. No case can be cited where a recovery has been allowed under such circumstances, but there are many instances where it has been refused.

In Torrey *vs.* Bost. and Alb. R.R., 147 Mass., 412, it was held that a passenger thrown from a train by the jerk in starting, while standing unnecessarily on the platform of the car, cannot recover, because of his own contributory negligence in needlessly and voluntarily occupying such a position.

In Goodwin *vs.* Boston and M. R.R. Co., 24 Atlantic Rep., 816 (Maine Sup. Court, January, 1892), it was held a passenger could not recover for injuries received while riding on the platform of a car. The Court said at p. 817:

> "The danger of standing on the narrow platform of a passenger car while the car is moving with the usual speed of railroad trains, is most conspicuous. No prudent man, no man ordinarily mindful of his conduct and of matters about him, would occupy such a position. The

greater the speed of the train the more imminent the danger in such a place. Thoughtful people instinctively shudder when they see a person taking such risks, * * * the knowingly incurring such an imminent, visible peril, the choosing to ride in such a conspicuously dangerous place, must be held by all reasonable people to be reckless in a high degree. The danger, the chance of injury, is visibly imminent and great. No man of reason can fail to apprehend it. No prudent man would fail to avoid it. * * * That Goodwin was not ordered off the platform could not have led him to believe that it was safe to ride there. He needed no warning of such danger."

In Lewis *vs.* B. & O. R.R. Co., 38 Md., 588, the plaintiff traveling after dark along a street in the city found a street blockaded by a freight train which the defendant was engaged in making up. After waiting some time, plaintiff undertook to get across by climbing over the platform between two cars, as he had seen several others do, and while he was so attempting, the train was moved, and he was injured, held, that as a matter of law he was killed by reason of his own contributory negligence, and that he could not recover, even though the defendant unlawfully obstructed the crossing.

See also cases cited above.

Wallace *vs.* West. N. C. R.R. Co., 98 N. C., 494.

Perkins *vs.* Chicago, &c. R.R. Co., 60 Miss., 726.

Merrill *vs.* East. R.R. Co., 139 Mass., 238.

Suppose the deceased had ridden in the same position upon the roof of a car in a passenger train, or even upon the platform of a car in a passenger train, could there be any doubt that such action upon his part would have barred a recovery?

But one riding upon a freight train must be presumed to know that it is necessarily more dangerous than a passenger train, and that, therefore, he is required to exercise more care in protecting himself from harm.

Harris *vs.* R.R. Co., 89 Mo., 233.

Smith *vs.* R.R. Co., 34 Am. & Eng. R.R. Cas., 557.

Nor would it be any excuse that an employé of the company had directed him to assume a position manifestly dangerous. Suppose the conductor had directed the deceased to ride upon the cowcatcher, would that entitle him to recover for injuries occasioned by his presence there?

In R.R. Co. *vs.* Jones, 95 U. S., 439, the plaintiff below was injured while riding on the pilot of the locomotive, a position which he claimed he had assumed by direction of the foreman of the gang of laborers in which he was working. Mr. Justice Swayne, in delivering the opinion of the Court, holding that a judgment below in his favor was erroneous. said at page 443:

> "The knowledge, assent or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry,—this was no justification for taking such a risk. As well might he have obeyed the suggestion to ride on the cowcatcher or put himself on the track before the advancing wheels of a locomotive. * * The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter, the former could not arise."

Counsel for the plaintiff in error suggests that the position of the deceased did not occasion the accident; because he would not have fallen except for the jar. It might as well be argued that he would not have fallen if he had not got upon the train, or that if the train had not been run at all, no accident would have happened. It is plain that the deceased's position was the immediate cause of his injury, the *causa causans;* for no one else upon the train was harmed or even disturbed by the jar which occurred.

R.R. Co. *vs.* Jones, above cited.

Again it is urged that the age of the deceased forbids the application of the ordinary rules of contributory negligence. But this contention is without weight. The deceased was a bright boy, seventeen years old and had

been to school, and afterwards worked as a messenger boy and made a good deal of money (fol. 35). It is idle to say that such a boy did not understand the dangers of the situation, particularly as he and the other boys had ridden many times before. The rule is well settled that an infant over the age of fourteen will be presumed to be capable of protecting himself and responsible for contributory negligence.

In Nagle *vs.* Allegheny R.R. Co., 88 Pa. St., 35, Mr. Justice Paxson said, at p. 39:

> "The law fixes no arbitrary period when the immunity of childhood ceases and the responsibilities of life begin. For some purposes majority is the rule. It is not so here. It would be irrational to hold that a man was responsible for his negligence at twenty-one years of age, and not responsible a day or a week prior thereto. At what age, then, must an infant's responsibility for negligence be presumed to commence? This question cannot be answered by referring it to the jury. That would furnish us with no rule whatever. It would give us a mere shifting standard affected by the sympathies or prejudices of the jury in each particular case. One jury would fix the period of responsibility at fourteen; another at twenty or twenty-one. This is not a question of fact for the jury. It is a question of law for the Court. * * * * We have thus seen that the law presumes that at fourteen years of age an infant has sufficient discretion and understanding to select a guardian and contract a marriage; is capable of harboring malice and of taking human life under circumstances that constitute the offense murder. It, therefore, requires no strain to hold that at fourteen an infant is presumed to have sufficient capacity and understanding to be sensible of danger, and to have the power to avoid it. And this presumption ought to stand until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of fourteen years of age."

Many instances might be cited where boys much younger than the deceased have been held guilty of contributory negligence.

In Wendell *vs.* N. Y. C. R.R., 91 N. Y., 420, a bright, active boy, seven years old, was held guilty of contributory negligence as matter of law in attempting to cross in front of an approaching train.

In Messenger *vs.* Dennie, 141 Mass., 335, a boy eight

years and nine months old, was held guilty of contributory negligence.

So in Masser *vs.* Chicago, &c., R.R., 68 Iowa, 602, the boy was eleven years old.

In Moore *vs.* Penn. R.R., 99, Penn. St., 301, the boy was ten years old.

In Colgan *vs.* West. Phila. R.R. Co., 4 Wkly. Notes of Cases (Penn.), 400, the boy was sixteen years old.

In Dietrich *vs.* R.R. Co., 58 Md., 347, the boy was fourteen years old.

In Sherman *vs.* Hannibal R.R. Co., 72 Mo., 62, the conductor of a freight train allowed a boy, thirteen years old, to ride upon one of the cars, and a brakeman, without authority, set him at a dangerous service on the car, in trying to perform which he was injured, it was held that the company was not liable.

It is plain, therefore, that the Court below was right in holding that the deceased's age did not protect him from the consequences of his own imprudence and recklessness.

Even if, then, it could be assumed, in any view of the case, that there was evidence of negligence on the part of the defendant, the testimony affirmatively established contributory negligence on the part of the deceased, which would prevent a recovery in the action.

The Court below, therefore, properly disposed of the case, and its judgment should be affirmed.

CHARLES STEELE,
WILLIAM D. GUTHRIE,
For Defendant in Error.

146 U.S. 513

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

JOHN MITCHELL, as administrator, etc., of LAWRENCE MITCHELL, deceased, Plaintiff in Error.

vs.

THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY.

October Term, 1892
Number 71.

Supplemental Brief of Plaintiff in Error.

IN REPLY TO STATEMENT OF FACTS OF DEFENDANT IN ERROR.

I.

In only one particular is it claimed by the Defendant in Error, that the statement of facts in the Brief of Plaintiff in Error is incorrect.

On the 3rd page of the Brief for Defendant in Error, it is said: "The statement in the Brief for the Plaintiff in Error, 'On "this occasion a brakeman and conductor saw the people on the "train and allowed them to ride,' is incorrect. (Brief for Plain- "tiff in Error, page 8.) The only testimony on the subject is "that quoted above, except that the witness, Henry, testified, "[folio 24]. 'The brakeman passed me and saw me on the

"train.' There is absolutely no evidence that the conductor "saw any of them or knew they were on the train."

To sustain the fact, thus questioned, the Brief of Plaintiff in Error at page 8, refers to fols. 18, 22, 23, and 24 of the Record. The exact language of the witnesses in these folios bearing upon the question is as follows:

[Fol. 18.] In the testimony of Robert Schubert, he says: "Finally the brakeman passed, and I said, 'Will you please "tell me what time this train is going?' He said, 'I don't know "I guess it is going pretty soon now.'"

[Fol. 22.] The same witness further along says in his re-cross-examination, "When we got on the brakemen were passing "with their lanterns right along. I don't know whether they "were connected with that special train or in the employ of the "company; but, they were brakemen I know, because they had "lanterns and were walking up and down."

[Fol. 23.] In the testimony of Robert Henry he says, "I saw "the brakeman and conductors there. I was not ordered off. "I remained on the train while it went through the tunnel."

[Fol. 24.] The same witness in his cross-examination says, "The brakemen passed me and saw me on the train."

This clearly shows that the plaintiff's intestate and others on the train not connected with it as employees, were in full view of the brakemen and conductor; and while the witnesses do not say in so many words, that the conductor saw them, they do say that the brakemen did, and one witness had a conversation with a brakeman. It would be a violent presumption to assume that the conductor did not see these people on this train. If the brakeman and conductor saw these people on this train and did not order them off, they certainly thereby allowed them to stay on. At all events, it would be a question of fact for the jury to decide.

II.

On the second page of Brief of Defendant in Error, a conversation between the boys while they were sitting on the train before it started is quoted *in extenso*, and on the 15th page of the same Brief the examination of the witness Schubert by the Court in reference to the subject of that conversation is set out in full.

It nowhere appears that the plaintiff's intestate took part in this conversation.

This conversation is to the affect that one of the witnesses, Robert Schubert, said that he was going to ask the next brakeman who passed, whether that train was going through; and another witness, Henry, replied, "Don't ask him, he may throw us off;" and then Schubert replied, "We'll run our chances, we might as well be thrown off the train as to stay here all night." The Court at fols. 20 and 22 of the record brought out a repetition of this testimony with the additional fact that the boys expected that they might be put off, but decided to run their chances.

The counsel for the Defendant in Error evidently fail to see that this testimony clinches the statement of the Plaintiff in Error that the boys and others on the train were allowed to remain. The testimony shows, that whatever misgivings the boys had as to whether or not they would be put off, they determined to take their chances. Accordingly when the first brakeman passed Schubert said to him, "Will you please tell me what time this train is going? He said, "I don't know, I guess it is going pretty soon now." And it did go about fifteen minutes afterwards." fol. 18.

This shows that whatever misgivings the boys had, were removed by the failure of the brakeman to put them off the train. They ran their chances of being put off, and the chances resulted in their favor.

III.

The Defendant in Error on page 3 of its brief also regards it as an important fact that "their plan, (the boys) was to jump off the train while it was in motion at First Street."

Although folio 24 of the Record is the only place where it is said that there was any intention to jump off between First and Ferry Streets the fact itself has no materiality whatever. A witness says he got off in that way and had no difficulty in doing so. fol. 27. The plaintiff's intestate was not injured in jumping off, but by falling off in consequence of the sudden jerk of the train (folios 18, 21, 23 and 24.)

From all the evidence in this case, the carrying out of the intention of the boys to jump off between Ferry and First Streets would have been attended with neither difficulty nor danger.

IV.

This jar or jerk was not the usual jar or jerk when a long freight train is slackening or increasing its speed. But it was a sudden jerk or jarring, folio. 19. The witness, Schubert, although frequently on those trains, could not say, that he had ever experienced such a jerk before, folio 21.

POINTS.

IN REPLY TO POINTS OF DEFENDANT IN ERROR.

FIRST.

On page 7 of Brief of Defendant in Error it is admitted that "there can be no question as to the rule established in this "Court, that if a carrier knowingly receive a person for trans-

"portation upon a freight train and then injure him through "negligence the carrier would be liable just as much as if the "train had been a passenger train."

This is a complete surrender of the whole question at issue in this case.

The learned Circuit Judge before whom the case was tried did not hold this to be the rule.

On the contrary he said: "I think it cannot be maintained on "the evidence in this case that the railroad company was under "a carrier's obligations towards the deceased as a passenger. " * * * * * * * * * If the deceased "had been a passenger, towards whom the obligation of a car- "rier is almost that of an insurer—that is, the obligation to take "the utmost care of which human skill and intelligence is "capable—you might say that from the circumstances of the "injury there was a presumption of negligence." fol. 37.

The counsel for defendant in error on page 8 of their brief go on to say: "But the point is, what is negligence?"

The answer to this question is that the trial judge held that if the defendant owed to the deceased a carrier's obligation then "*from the circumstances of the injury there was a presumption of negligence.*"

It is apparent that if the trial judge had recognized the rule which the counsel for defendant in error now concede he would not have directed a verdict for the defendant under the rule that it would have been his duty to set aside a verdict for the plaintiff if one should be found by the jury.

Pleasants v. Fant, 22 Wall, 116.
Bank v. Bank, 10 Id., 604.
Oscanyan v. Arms Co., 103 U. S., 261.

The Counsel for defendant in error claim that "what might

"be considered negligence in the operation of a passenger train, "by no means necessarily constitutes a want of due care in running a freight train." And a quotation is made from the opinion of this Court in the Horst case 93 U. S., 296, as an authority to sustain this proposition. But the opinion thus quoted does not support the contention of the defendant in error.

The language of this Court supposed to give relief to the defendant, is that the rule "does emphatically require everything "necessary to the security of the passenger upon either (pas- "senger or freight trains), and reasonably consistent with the "business of the carrier, and the *means of conveyance em-* "*ployed.*" The italics are made by the counsel for Defendant in Error in their Brief.

There is no evidence in the case at bar that sudden jerks or jars cannot be avoided by proper care on freight trains as well as on passenger trains. The defendant claims that testimony is unnecessary, see page 9 of its Brief.

In the Horst case it was a "quick and powerful concussion," which produced the injury for which the action was brought.

The train ran half or three-quarters of a mile to pass on to the switch and take on a caboose in place of one which had been detached. The train in backing on the switch stopped before it reached the caboose which was to be attached. It was thereupon suddenly drawn forward and then suddenly backed producing a quick and powerful concussion, which precipitated the plaintiff between the car on which he was standing and the hindmost car.

(See statement of facts by Mr. Justice Swayne).

The case was submitted to the jury and a verdict was found for the plaintiff. The judgment on that verdict was affirmed by this Court.

Hence it is apparent that this Court, in the language quoted,

could not have intended to hold that care should not be exercised to prevent sudden jerks or jars or concussions in the operation of freight trains.

The Counsel for Defendant in Error on page 8, also quote from Wharton on Negligence, that "that if the carrier knows "of a trespasser's presence on the train, and omits to expel "him, the carrier is bound from the time he assents to carry "such person, to exercise towards him the diligence, prudence "and skill of a good carrier in that particular kind of trans- "port."

This is also a concession of the contention of the Plaintiff in Error in the Second Point of his original Brief.

In the case of Reber vs. Bonds, 38 Federal Reporter, 822, referred to in The Brief of Defendant in Error, on page 9, the Plaintiff was awarded $2,750 damages.

HILL, JUDGE, in the Circuit Court of Misissippi, held that a person injured on a freight train was not entitled to as heavy damages as if the accident occurred on a passenger train. It is unnecessary to scrutinize his opinion in order to ascertain wherein the distinction lies. It is sufficient for the purposes of this argument, that he did not hold that the injured person could not recover for injuries sustained on a freight train. In stating the facts of the case Judge Hill, on page 822 says, "Dr. Reber (the plaintiff, who was "riding in a caboose on a freight train) and all the other pas- "sengers desiring to get off the train, arose from their seats, "and started to get out, when by a sudden jerk or jar the "caboose was thrown back. * * * and Dr. Reber "was thrown violently down on the floor."

The case of Waterbury vs. The New York Central and Hudson River Railroad Company, 17 Federal Reporter, 671, referred to on page 17 of "The Brief of Defendant in Error" is the authority which the learned Circuit Judge followed in deciding the case at bar, and was a case decided by the learned Circuit Judge himself.

The Counsel for the Plaintiff in Error, in the case at bar, after a careful reading of the opinion of Judge Wallace in this Waterbury case has been unable to undertsand its reasoning. It is apparent, however, that the Circuit Judge, in the Waterbury case as in the case at bar, did not enforce the rule as laid down by this Court.

In the note by Mr. Seymour D. Thompson, appended to the decision of Judge Wallace in the report of the Waterbury case at page 675, it is stated, that the rule of liability is not affected by the circumstance that the carrier's servant acted against his orders, and the case of Sherman, against Hannible, &c., Railroad Company, 75 Mo., 62 and 65 is cited; where a boy got upon a freight train without the knowledge or consent of the conductor, but the conductor, after finding him there, suffered him to remain, and it was held that he was entitled to the same protection as if he had been a passenger and had paid his fare.

A large number of authorities and decisions in other jurisdictions are cited in the Brief of Defendant in Error. Without attempting to distinguish them from the case at bar, it is sufficient to say that if they sustain the position of the defendant they are not in harmony with the decisions of this Court.

It may be that in Illinois, North Carolina, Mississippi and Massachusetts there is one rule of care in reference to the operation of passenger trains and another in reference to freight trains, but judging by the quotations from the opinions of the various Courts on pages 9 and 10 of "The Brief of Defendant in Error," those Courts do not reason from the same premises as this Court and the Courts of Indiana, Maine and Pennsylvania.

In the States of New York and Missouri some contrariety seems to exist in the opinions of their Appellate Courts, and it is difficult to determine whether or not in those States the rule has been settled.

SECOND.

In the II Point of brief of defendant in error, under the head "The deceased was a mere trespasser," an elaborate argument is made on the questions of trespass, invitation or permission to ride, knowledge of the carrier of the presence of the trespasser, license, acquiescence, and authority of the employees to bind employer.

As the plaintiff in error has already discussed these questions in his original Brief, Points Second, Third, Fourth and Fifth it will be unnecessary to repeat what is there said.

But supplementing that discussion it is proper to say here that what the plaintiff asked of the Court below was that all these questions be submitted to the jury under proper instructions. The refusal of the trial Judge to make such submission and instructions is the subject of the Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Errors assigned.

See original Brief of plaintiff in error, pages 3, 4 and 5.

Most, if not all of these questions are secondary. The primary question in this case is whether a different rule of care is required in the operation of freight trains from that applicable to regular passenger trains. Had the trial Judge held with the plaintiff on this primary question in all probability he would have disposed of these secondary questions in accordance with the plaintiff's requests to charge.

Record folios 39-41.

THIRD.

In reply to the question of the concurring negligence of the deceased, discussed in the Brief of Defendant in Error, from

pages 21 to 25 inclusive, very little need be added to what is said in the Original Brief of Plaintiff in Error in the Sixth and Seventh Points.

Under the rules of this Court the question of the contributory negligence of infants is always for the jury. This is so well settled that it is no longer open for debate. The Counsel for Defendant in Error cite no decision of this Court to the contrary. The only decision in this Court they do cite under this head is the case of R. R. Co. v. Jones, 95 U. S., 439. In that case the injured person was not an infant. He was an employee, and the case was decided under the rules of Master and Servant law, which have no application here.

CONCLUSION.

Unless this Court makes a departure from its own well settled rules, the judgment in this case should be reversed and a new trial ordered.

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For Plaintiff in Error.